Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

HARRY ALEMAN,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner's guarantees against being twice placed in jeopardy and due process were violated where he was placed on trial nearly 20 years after his acquittal for the same offense?

2. Whether Petitioner's guarantee to due process of law was denied by the trial court's refusal to hold an evidentiary hearing on jury taint where one of the jurors was removed after expressing her fears of continuing to serve and admitted she had discussed these fears with fellow jurors?

3. Whether the prosecution's closing argument violated *Griffin v. California,* 380 U.S. 609 (1965)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Harry Aleman prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court, First District, affirming his conviction and sentence for murder.

OPINIONS BELOW

The published portion of the opinion of the Illinois Appellate Court, First District, affirming Petitioner's conviction and sentence is reported at 313 Ill. App. 3d 51, 729 N.E.2d 20, and attached hereto in Appendix A. In affirming Petitioner's conviction and sentence on March 31, 2000, the Illinois Appellate Court also entered an unpublished opinion which is attached hereto in Appendix B. The Illinois Appellate Court's unpublished order on May 25, 2000 denying rehearing is attached hereto in Appendix C. The denial of review by the Illinois Supreme Court is reported at 191 Ill. 2d 536, 738 N.E.2d 929, and is attached hereto in Appendix D. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the denial of habeas corpus is reported at 138 F.3d 302, and is attached hereto in Appendix E. The opinion of the United States District Court for the Northern District of Illinois denying a writ of habeas corpus is reported at 967 F. Supp. 1022, and is attached hereto in Appendix F. The opinion of the Illinois Appellate Court affirming the denial of Petitioner's pretrial plea of *autrefois convict* is reported at 281 Ill. App. 3d 991, 667 N.E.2d 615, and is attached hereto in Appendix G. The opinion of the Circuit

Court of Cook County on March 9, 1995 denying Petitioner's pretrial plea of *autrefois convict* is unreported, and is attached hereto in Appendix H.

JURISDICTION

The Illinois Appellate Court, First District, affirmed Petitioner's conviction and sentence on March 31, 2000, and denied a timely filed Petition for Rehearing on May 25, 2000. Petitioner filed a timely Petition for Leave to Appeal to the Illinois Supreme Court which was denied on October 4, 2000. Jurisdiction is conferred by 28 U.S.C. § 1257(a) and United States Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves two provisions of the Fifth Amendment to the United States Constitution, and the Due Process Clause of the Fourteenth Amendment. In pertinent part, the Fifth Amendment reads as follows:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself . . .

The Fourteenth Amendment reads in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law.

STATEMENT

For a week in May, 1977, Petitioner stood trial for murder in a bench trial, at the conclusion of which he was acquitted on a finding that the evidence was insufficient. Fifteen years later, one Robert Cooley alleged that he had bribed the trial judge on Petitioner's behalf, and Petitioner was reindicted for the same murder. Petitioner's pleas of *autrefois acquit* were rejected, and Petitioner was retried by a jury, convicted and sentenced.

The trial before the jury resembled an armed camp rather than a courthouse. Armed guards escorted the jury through cordoned-off stairwells and blocked-off streets, surrounded by police cars with flashing lights. During the trial, one juror expressed such extreme apprehension and fears for her safety that at her request the trial court excused her from further service. However, the court refused to conduct a *voir dire* of the other jurors with whom the excused juror had been in contact to determine whether some or all were tainted. Likewise, the trial court refused to hold an evidentiary hearing into whether the militia-like trial environment constituted a prejudicial intimidating atmosphere upon the jury.

During closing argument, the prosecutor, referred to the defendant who had not testified, in the following language: ***"He's the only one in this room who didn't come on this witness stand and talk about accepting responsibility. And again, the defendant does not have to testify."***

REASONS FOR GRANTING THE WRIT

A. The Illinois Courts' Placing Petitioner on Trial Despite His Earlier Acquittal For the Same Offense Violated Petitioner's Fifth Amendment Constitutional Guarantee Against Being Twice Placed in Jeopardy and His Fourteenth Amend-Ment Right to Due Process of Law.

Petitioner was tried for murder in a bench trial in 1977 and acquitted on evidence insufficiency grounds. Fifteen years later one Robert Cooley claimed that he had been given $10,000.00 by someone (deceased) to bribe the judge (deceased) on Petitioner's behalf. As a result of this testimony, Petitioner was again placed on trial for the same murder, his plea of double jeopardy was denied and he was convicted by a jury.

This Court has held that the double jeopardy prohibition of the Fifth Amendment is applicable to the several states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969). This Court's adamant position has been repeatedly stated: A second trial after acquittal is barred even if "the acquittal was based upon an egregiously erroneous foundation." *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). This is "the most fundamental rule in the history of double jeopardy jurisprudence." *United States v. Martin Linen Supply Company*, 430 U.S. 564, 571 (1977).

No court which has reviewed this cause has been able to cite precedent for its holdings that there is a so-called "bribery exception" to this implacable language. Yet, each has "discovered" such an exception with the result that nearly 20 years after his acquittal Petitioner

was again placed in jeopardy for the same offense, convicted and sentenced.

B. By its Refusal to Hold an Evidentiary Hearing into the Possibility of One or More Jurors Being Tainted by the Expressed Fears of One Juror, the Trial Court Violated the Holdings of this Court in *Remmer v. United States*, 347 U.S. 227 (1954), and *Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479 (2000).

From the outset and throughout the trial, the courthouse resembled a military installation. Policemen and police vehicles permeated the areas through which the jurors were compelled to pass. The trial judge refused a requested hearing into possible jury intimidation. The fact that these persons were law enforcement personnel rather than a local mob was unmitigating. Dissenting in *Frank v. Mangum*, 237 U.S. 309 (1914), Justice Holmes said, "Any judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere. . . . Mob trial does not become due process of law by securing the assent of a terrorized jury." *Id.* at 347.

After the trial was underway, Juror Brenda Smith contacted the trial judge, and, when questioned, expressed extreme apprehension in continuing to serve. Contrary to court orders, she said that she had discussed her fears with the other jurors who "have said things." In response to the trial court's further questions about whether she had discussed her fears with other jurors, Juror Smith made the following statements: "I guess there are discussions then. . . . Basically, you know, I hope we're around after this. . . . We'll exchange Christmas

cards, and hopefully we are all around at Christmas time. . . . I think (the other jurors) possibly know. . . . I feel I've discussed it because I said, 'I haven't been sleeping at night'. . . . Yes, I think other people probably know my fears and apprehensions." The trial judge excused Juror Smith, but denied Petitioner's motion that the court conduct a *voir dire* or hearing involving the other jurors to determining the existence of juror taint.

"One touchstone of a fair trial is an impartial trier of fact." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984). Just last Term in a case involving the possible prejudice of a *single* juror, *Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479, 1494 (2000), this Court unanimously stated, quoting from *Smith v. Phillips*, 455 U.S. 209, 215 (1982), "[T]he remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." In this case, rather than the possibility of a single tainted juror, one or more may have been tainted. The trial court below violated its obligation to "determine the circumstances, the impact thereof upon the juror(s), and whether or not [they were] prejudicial, in a *hearing with all interested parties permitted to particpate.*" [Emphasis supplied.] *Remmer v. United States*, 347 U.S. 227, 230 (1954).

C. Prosecutorial Closing Argument Referring to the Defendant's Failure to Testify Violated Petitioner's Fifth and Fourteenth Amendment Guarantees Against Self-Incrimination and to Due Process of Law.

In final argument, the prosecutor exhorted the jury: "He's (the defendant) the only one in this room who

didn't come on this witness stand and talk about accepting responsibility. And again, the defendant does not have to testify." Defense counsel's motion for a mistrial was denied.

This Honorable Court has held that comments upon the accused's right not to testify violate the Fifth Amendment guarantee against being compelled to incriminate oneself as enforceable through the Fourteenth Amendment Due Process Clause. *Griffin v. California*, 380 U.S. 609 (1965). In this day and age, there simply is no excuse for the prosecutorial misconduct in this case. Moreover, the State's case against Petitioner – based upon the word of an informant and an "eye witness" who impeached each other on critical events – was hardly overwhelming. The Illinois Appellate Court constitutionally erred in finding the error "harmless."

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue.

Respectfully submitted,

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APPENDIX A

(To be reported at: 729 N.E.2d 20)
(Cite as: 2000 WL 339952 (Ill.App. 1 Dist.))

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Harry ALEMAN, Defendant-Appellant.

No. 1-98-0047.

Appellate Court of Illinois
First District, Fifth Division.

March 31, 2000.

Rehearing Denied May 25, 2000.

Marc W. Martin; Alexander Salerno, Chicago; and Kevin McNally and Margaret O'Donnell, Frankfort, KY, of counsel, for Appellant.

Richard A. Devine, State's Attorney, Chicago (Renee Goldfarb, James E. Fitzgerald and John Robert Blakey, of counsel), for Appellee.

Justice HARTMAN delivered the opinion of the court:

A jury found defendant Harry Aleman guilty of first-degree murder and he was subsequently sentenced to a term of 100 to 300 years' imprisonment.[1] Defendant

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[1] On September 27, 1972, Billy Logan was shot to death on West Walton Street in Chicago. In December 1976, defendant was indicted for Logan's murder. Following a bench trial before Judge Frank Wilson in May of 1977, defendant was acquitted. Several years thereafter, federal investigators uncovered evidence that Judge Wilson had accepted a $10,000 bribe to find defendant not guilty. In February 1990, two months after Judge Wilson was informed by the FBI of the investigation into

appeals from his second trial; among errors he identifies are: (1) errors occurring during voir dire deprived him of a fair trial; (2) the court erred in refusing to question individual jurors as to possible conversations with another juror; (3) the court erred in imposing certain security measures in the courtroom; (4) he was denied a fair trial by the admission of "other crimes" evidence regarding judicial bribery; (5) he was denied a fair trial by the State's alleged references to organized crime; (6) he was denied a fair trial in the admission of impeachment evidence indicating that he had committed a home invasion with an accomplice; (7) he was denied a fair trial where his attorney, in opening statement, referred to the testimony of a possible State witness who did not testify; (8) he was denied a fair trial where a witness testified that the judge in defendant's previous murder trial committed suicide; (9) alleged prosecutorial misconduct at argument denied him a fair trial; (10) the court erred in refusing to grant his defense counsel a two-week continuance; (11) the court abused its discretion in limiting his cross-examination of State witnesses; (12) the court abused its discretion in curtailing the testimony of a defense expert; (13) the court erred in finding that the

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bribery, he committed suicide. In December 1993, defendant was again indicted for Logan's murder. Although he sought to dismiss the indictment through the application of double jeopardy principles, the circuit court held that double jeopardy did not bar re-indictment or re-prosecution. This court affirmed (*see People v. Aleman*, 281 Ill.App.3d 991, 217 Ill.Dec. 526, 667 N.E.2d 615 (1996)); accordingly, defendant was retried, from which result the present appeal is taken.

previous judge's suicide was admissible as rebuttal evidence if defendant chose to seek admission of the previous judge's specific findings; (14) he was denied due process as a result of alleged error occurring at his suppression hearing; and (15) issues relating to re-indictment and re-prosecution (double jeopardy, speedy trial) must be reconsidered in light of "new evidence." Issues (1), (2), (4), (5) and (9) will be considered in this opinion; issues (3), (6) through (8), and (10) through (15) will be determined in a separate Supreme Court Rule 23 order disseminated contemporaneously.

In the case sub judice, the 23-volume record reflects that on retrial, the State presented evidence from several witnesses regarding Logan's murder. Logan lived with his sister, Betty Romo, and another sister. On September 27, 1972, Logan left for work at 11 p.m. Shortly after, Romo heard three loud noises or shots. Running outside, she discovered Logan, bleeding from two fatal shotgun wounds. Logan had been divorced from defendant's second cousin, Phyllis Napoles. They were engaged in a custody battle. Previously, he had been arrested for her assault and battery.

Bobby Lowe, Logan's neighbor, testified that on September 27, while walking his dog, he observed a vehicle parked across the street with its engine running and Logan walking to his parked automobile. As Lowe approached Logan to speak with him, the other vehicle pulled up. Lowe heard two loud noises and saw Logan fly backwards. Defendant exited the passenger side of the vehicle, approached Logan with a gun-like object in his hand, which he pointed at the fallen Logan. Lowe stared at defendant for four or five seconds, standing three or

four feet away, then turned and ran. While running, he heard another loud noise and heard the vehicle drive away. In 1972, he picked out defendant's photograph and again, in 1976, he identified defendant as Logan's shooter for police. As a result of witnessing the shooting, Lowe was forced to quit his job and was relocated. He received money from the State during both trials. Lowe had incurred many debts, which he paid in part with money received from the State.

Louis Almeida, a career criminal who had grown up in the same neighborhood as defendant, testified for the State. In March of 1975, while driving through Ohio on their way to "kill somebody" for $10,000 in Pennsylvania, he and Joe Neri were stopped by Ohio police and arrested for possession of weapons and a silencer. Almeida provided police with information about his various criminal activities, including armed robberies, vehicle thefts, and bombings. Later, he reported details of Logan's murder identifying himself as the driver and defendant as the shooter. In exchange, Almeida was given immunity from prosecution for Logan's murder.

According to Almeida, in August of 1972, defendant discussed his plan to kill Logan and gave him two license plate numbers and Logan's home and work addresses, writing "Death to Billy" on the same piece of paper. Almeida then trailed Logan to learn his habits and schedule.

On the evening of September 27, 1972, defendant, armed with a shotgun and a .45 caliber handgun, was driven by Almeida to Logan's block, where he parked. Almeida observed a man walking a dog. At 11:15 p.m., he

saw Logan. Almeida drove the automobile near Logan. Defendant called to Logan. Logan walked toward them. Defendant shot him twice with a 12-gauge shotgun. Logan "flew back" and began crawling and yelling for a doctor. Defendant stepped half-way out of the car, but "shut the door on the car and [said], let's go, he's gone."

The State then presented evidence regarding defendant's 1977 trial for Logan's murder, which resulted in acquittal. Robert Cooley, a former Chicago Police Officer and attorney during the late 1970's, testified that while he was a police officer, and also later when he practiced criminal law, he often bribed judges, clerks and sheriffs. While an attorney, Cooley visited the "Counselor's Row" restaurant, which members of Chicago's "First Ward" political organization frequented.

In February 1977, Cooley met with First Ward secretary Pat Marcy and ward committeeman John D'Arco, Sr. Marcy told Cooley of defendant's "murder case" and asked him if he knew of a judge who could "handle it," or fix the case. Cooley described Judge Wilson as a "very close" friend but a "drinker" who might need the money.[2] Cooley approached Wilson, who initially informed Cooley that he had been "SOJ'd"[3] and was unable to help. Cooley later told Wilson the case against defendant was weak, it could be handled very easily, and that Cooley would pay him $10,000 for an acquittal should the case be reassigned to Wilson. Wilson later agreed to "handle" the

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[2] Cooley also testified that Judge Wilson was "very straight" and a "state-minded" judge, who, to his knowledge, had never accepted a bribe.

[3] Referring to a motion for substitution of judge.

case if Tom Maloney, then defendant's attorney, withdrew his SOJ motion and withdrew from the case; he also asked that Cooley not represent defendant, to avoid any appearance of impropriety. Cooley then gave $2,500 to Wilson, the remaining $7,500 to be paid when the trial was over.

After paying Judge Wilson, Cooley met with defendant and another man, Marco D'Amico, assuring them both that the case had been fixed and that Wilson would acquit defendant. Cooley told them of Wilson's conditions. It was agreed that Frank Whalen, a former Chicago attorney living in Florida, would represent defendant, and Cooley met Whalen at the Bismark Hotel in April 1977. There, Cooley told Whalen that Wilson was going to "throw the case out," but wanted no contact with Whalen. Cooley would act as middleman; Whalen agreed.

Cooley again met with defendant, who told him that Maloney had "come up with an alibi" for the night of Logan's murder, that defendant had been hitting golf balls with three or four friends. Defendant also stated that "somebody" had "gotten to" police investigators and some of the police reports would not "make it" to court. Cooley and defendant met again. Butch Petrocelli was present. Defendant informed Cooley that a female witness to the Logan murder had accepted $10,000 to testify that defendant had not done the shooting. Cooley later informed Judge Wilson about this witness, who thought that was a good idea. Cooley did not, however, inform Wilson of the $10,000 witness payment. Cooley then met Whalen in Florida a week before the trial and again assured him that Wilson would throw the case out.

On the second day of the 1977 trial, Cooley met Judge Wilson, who was very upset because the case was not as weak as represented and Whalen was not doing a good job. Cooley warned Wilson to follow through with the deal. The next day, Cooley told Marcy of this development; Marcy responded that Wilson had better do as agreed.

Cooley again met with Judge Wilson. Wilson had discovered that the female witness was receiving $10,000 for testifying falsely. He complained of receiving $10,000 although he was a "full circuit judge," and requested more bribe money. Cooley told Wilson he would see what he could do, but to fulfil his part of the deal or both would be in a great deal of trouble. Cooley then met with Marcy again, addressing Wilson's demand; Marcy refused additional payment.

On May 24, 1977, Judge Wilson acquitted defendant of Logan's murder. Marcy then gave Cooley two envelopes; one contained $7,500 for Wilson and the other held $3,000 for Cooley. That evening, Cooley met Wilson at a restaurant. In the men's room, Cooley gave Wilson the remaining $7,500 of the bribe. Wilson said he was a "broken man" and that Cooley had "destroyed" and "killed" him.

A few weeks later, defendant, while with Petrocelli, thanked Cooley, telling him that he had done a great job, and asked Cooley for a few of his business cards so that he could send him more clients.

On cross-examination, Cooley testified, among other things, that since 1986 he had been paid $3,400 per month

by the government. He admitted having a heavy gambling habit and cheating on his taxes. The State rested.

Defendant presented the testimony of several witnesses, including William Dietrich, Billy Logan's nephew, and Stanley Ryba, Logan's neighbor, to challenge Lowe's account of the shooting. Dietrich, who was living with Logan on September 27, 1972, recalled being asleep on the front porch at 11 p.m. He awoke to hear someone say, "hey, Bill, come here." Immediately hearing two gunshots, he looked outside and saw Logan on his knees, falling backwards. He noticed a large vehicle, but no one else on the street at that time. Ryba, a neighbor of Logan's, testified that he was watching television in his home six houses away. At 11 p.m., he heard a gunshot, looked out his window and saw a car double-parked on the street and a man "down" nearby. No one else was in the area. Guido Calcagno, Almeida's life-long friend, testified for defendant that he had known Almeida since they were both children. Almeida was "not very truthful" with a "tendency to lie about everything." Several police officers who had investigated Logan's murder testified that Lowe initially was "reticent" and fearful who, at first, only identified the occupants of the automobile as two white males.

Logan's son, William Jr., and Phyllis Napoles, defendant's second cousin and Logan's ex-wife, also testified for defendant. They suggested that Petrocelli, not defendant, shot Logan. Napoles described Logan as an abusive drunk and characterized her relationship with Logan as "tumultuous." After her divorce from Logan in 1967, she had a relationship with Petrocelli, a "very violent" man with a "dark side." In March 1972, Logan, in a drunken

state, kicked the door of her home and threatened her. Petrocelli, who was present, began arguing with Logan and a violent physical confrontation ensued, during which Petrocelli threatened to kill Logan. Logan's son, William Jr., present during this fight, testified that he heard Petrocelli tell Logan that "he'll take him out."

The defense also presented the testimony of Ed Whalen, Jr., Frank Whalen's nephew, in questioning Cooley's account of Judge Wilson's bribe. Whalen, Jr. often helped his uncle with cases, including defendant's 1977 murder trial. His uncle, who had partially retired to Florida, stayed in a condominium in the Hancock Building, not the Bismark Hotel, whenever he came to Chicago. Whalen, Jr. never came into contact with Cooley during the 1977 trial. The trial was legitimate and not fixed. Neither Frank Whalen nor defendant ever indicated to Whalen, Jr. that the case had been predetermined.

The jury found defendant guilty and he was sentenced to a prison term of not less than 100 and not more than 300 years.

I

Defendant initially raises several issues concerning the selection of the jury, claiming he was denied a fair trial.

A

As a result of defendant's concern about pre-trial publicity, the circuit court employed a two-step process to

select the jury, first, individually questioning members of the venire (outside the presence of others) as to their knowledge about the case or defendant. Those members who had been exposed to pre-trial publicity were questioned further as to their knowledge of the facts and the effect, if any, of the exposure. This "special," individual questioning by the court occurred outside the courtroom with only the attorneys and defendant present. After excusing for cause those venire members who had knowledge of the case or defendant, the court then conducted the "typical" voir dire: twelve venire members were called to the jury box and then questioned by the court and the attorneys, in the presence of the entire venire; those that were excused were then replaced by other members of the venire; and the process continued until 12 jurors were empaneled. Defendant acquiesced in this two-step process, but now complains about the jury selection "atmosphere," contending it was "publicity-tainted."

Of the approximately 70 venire members, only 16 indicated that they had heard about the case or defendant. Of those, seven were excused for cause having expressed prejudice against defendant. Also excused were four venire members who had heard about the case or defendant due to reasons not involving pre-trial publicity.

Defendant also portrays jury selection as rife with gossip and murmurs, pointing to an incident involving a venire member, Neva O'Laughlin, who was excused by the court because of her expressed inability to be impartial as a result of exposure to pre-trial publicity. After excusing her for cause, the court was informed by a deputy that O'Laughlin, prior to jury selection, had been

seen with five or six other venire members discussing defendant's case and his affiliation with the "mob." As a cautionary measure, the deputy then pointed out to the court, as the venire members were questioned by the court, the individual venire members who had been seen near O'Laughlin. Those venire members did not serve on defendant's jury. Accordingly, defendant's assertion that the entire venire was somehow poisoned by pre-trial publicity is refuted by the record.

B

Defendant also claims that he was denied a fair trial because the circuit court refused him the right to question individually the venire members, during the first phase of jury selection, regarding pre-trial publicity, and failed to strike for cause four venire members. He also insists that the court should have conducted "supplemental" voir dire of those four venire members.

The right to an impartial jury is fundamental to due process and any infringement of that right requires reversal. *People v. Cole*, 54 Ill.2d 401, 411, 298 N.E.2d 705 (1973). One purpose of voir dire is to filter out and eliminate prospective jurors who are not impartial. *People v. Peeples*, 155 Ill.2d 422, 463, 186 Ill.Dec. 341, 616 N.E.2d 294 (1993); *People v. Carroll*, 260 Ill.App.3d 319, 342, 197 Ill.Dec. 696, 631 N.E.2d 1155 (1992). Impartiality is not a technical concept, however, and a circuit court's determination of whether a prospective juror is biased is entitled to deference, given its superior position to gauge the meaning of responses to questions posed. *People v. Pitsonbarger*, 142 Ill.2d 353, 388, 154 Ill.Dec. 562, 568 N.E.2d 783 (1990).

Accordingly, unless against the manifest weight of the evidence, a court's determination, whether to strike a potential juror for cause, will be upheld. *Peeples*, 155 Ill.2d at 463, 186 Ill.Dec. 341, 616 N.E.2d 294.

Defendant points to four members of the venire whom the circuit court refused to strike for cause; however, none of those venire members sat on his jury. In fact, three of them never were called and questioned during the second, "typical," phase of jury selection. Only one was called to the jury box for the typical voir dire and questioned; after defense questioning, defendant used one of his peremptory challenges to excuse her. Given the fact that none of the complained-of prospective jurors sat on defendant's jury, his assertion of prejudicial error is without foundation.

The circuit court retains "broad discretion" in conducting voir dire and only where the court's procedures and decisions have frustrated the purpose of voir dire will an abuse of discretion be found. *People v. Hope*, 168 Ill.2d 1, 30, 212 Ill.Dec. 909, 658 N.E.2d 391 (1995); *People v. Howard*, 147 Ill.2d 103, 134, 167 Ill.Dec. 914, 588 N.E.2d 1044 (1991). Here, the court went to extraordinary, if somewhat unorthodox, lengths to ensure that an impartial and fair jury was empaneled. The court's actions were undertaken for the sole purpose of guaranteeing an orderly and fair tribunal, which was accomplished.

C

Defendant also contends that the circuit court's refusal to ask the individual venire members about newspaper subscriptions denied him a fair trial. A review of

the record, however, indicates that the court's questions thoroughly addressed any potential prejudice due to exposure to pre-trial publicity. Any questions regarding mere subscription information would have been cumulative and irrelevant.

The purpose of the special publicity voir dire was to ferret out those venire members who had actual knowledge of defendant or the case and to determine the effect, if any, of that knowledge on the individual. Each venire member was asked if he or she had heard or read anything about defendant or his case before arriving at, or since entering, court. When this first inquiry was answered affirmatively, the court then questioned the individual venire member as to the source and specific nature of the information and its effect.

Accordingly, defendant's suggestion that the circuit court abused its discretion in failing to ask generally about subscriptions does not persuade. Such an inquiry would not have yielded any additional, cogent information regarding exposure to publicity.

D

Defendant also insists that he was denied a fair trial where the circuit court failed to give the venire a dinner break after a lengthy day of jury selection to the expressed dissatisfaction of the venire, which, he claims, alienated and enraged the jury.

The circuit court conducted voir dire over an admittedly lengthy period. From the early afternoon until nearly 9 p.m., the court and attorneys questioned the

venire. The court's decision was expressly made to accommodate the "one day/one jury" promise initially made to the venire members: "my fear is that if we don't move forward with the regular voir dire we are going to get a lot of angry people and we will lose much of what we accomplished today." To deflect any animosity toward the attorneys, the court also advised the empaneled jurors that it was the court's decision, not the attorneys', to work late for which the court took responsibility. Moreover, given that the procedures instituted by the circuit court were undertaken in response to defense fears regarding pre-trial publicity, it cannot be said the court abused its discretion. *Hope*, 168 Ill.2d at 30, 212 Ill.Dec. 909, 658 N.E.2d 391.

E

Defendant next argues that he was denied a fair trial because the circuit court "bridled" defense questions to the jury and "constantly" sustained the State's objections to defense questions. The State did object to defense questioning of venire members; however, those questions were over-broad and nonspecific. The State's objections were appropriate.

Prior to voir dire, the circuit court warned the defense several times that questions dealing with the evidence in the case or involving the venire members' "feelings" about issues in the case were inappropriate. Nevertheless, the defense, on numerous occasions, queried the venire members as to their "feelings" about various principles of law and attempted to suggest to the jury its theory of the case. The court did not forestall

proper inquiry, but merely prevented the defense from asking either legitimate questions in an inappropriate manner or improper questions. *See* 166 Ill.2d R. 431. Accordingly, the court did not abuse its discretion in sustaining objections to clearly inappropriately-worded defense questions. *See People v. Zehr*, 103 Ill.2d 472, 83 Ill.Dec. 128, 469 N.E.2d 1062 (1984); *People v. Williams*, 159 Ill.App.3d 527, 532, 111 Ill.Dec. 131, 512 N.E.2d 35 (1987).

F

Defendant also claims that the circuit court "failed to allow attorney-questioning of prospective alternate jurors" in violation of Rule 431(a) (166 Ill.2d R. 431(a)). Defendant's argument, however, is waived due to his failure to object at trial.

Before selection of the alternates, the circuit court indicated that the court, not the attorneys, would ask the questions. Defendant did not object to this procedure. In any event, defendant has failed to show how the court abused its discretion in appropriately questioning alternate jurors. *See People v. Terrell*, 185 Ill.2d 467, 484, 236 Ill.Dec. 723, 708 N.E.2d 309 (1998).

G

Defendant's final issue in this regard is that the circuit court erred in refusing to require the State to explain its use of peremptory challenges directed at two African-Americans and one Hispanic venire member.

In raising a Batson claim, a defendant must first prove that the prosecutor exercised peremptory challenges to remove venire persons of a cognizable racial group and that the relevant circumstances create an inference of discrimination in the exclusion based on race. *People v. Evans*, 125 Ill.2d 50, 61-67, 125 Ill.Dec. 790, 530 N.E.2d 1360 (1988); *see also People v. Evans*, 186 Ill.2d 83, 91, 237 Ill.Dec. 118, 708 N.E.2d 1158 (1999). Relevant circumstances may include: a pattern of strikes; the prosecutor's questions during voir dire; a disproportionate use of peremptory challenges; whether the excluded members were a heterogeneous group sharing race as the only common characteristic; the level of representation in the venire as compared to the jury; and the race of the defendant, victim and witnesses. *People v. Edwards*, 144 Ill.2d 108, 153, 161 Ill.Dec. 788, 579 N.E.2d 336 (1991). Only if a court finds that a defendant has met a prima facie showing will the court require the State to provide race-neutral reasons for the exercise of its peremptory challenges. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *People v. Fort*, 248 Ill.App.3d 301, 307-08, 187 Ill.Dec. 854, 618 N.E.2d 445 (1993).

Here, immediately after the State exercised its first three peremptory challenges, defendant raised his Batson claim, arguing that two of the State's challenges were directed at a "black female" and a "Hispanic male." When asked by the circuit court how these two challenges evidenced a pattern of strikes, defense counsel responded, "I don't think there needs to be a pattern of strikes." Defense counsel's misconception replayed itself when, after the State exercised two more peremptory

challenges, defense counsel was unable to show a pattern, but only pointed to the State's striking of two black males.

The circuit court correctly found that defendant did not meet his burden of proving a prima facie case of purposeful discrimination. Beyond the absence of any pattern of strikes, the record reflects no indication of racist motives in the prosecutor's questions and no indication of a disproportionate use of challenges against a specific racial group. *See People v. Harris*, 164 Ill.2d 322, 344, 207 Ill.Dec. 400, 647 N.E.2d 893 (1994); *People v. McDonald*, 249 Ill.App.3d 702, 188 Ill.Dec. 865, 619 N.E.2d 20 (1993). The record is silent as to the composition of the venire or the jury and the race of the witnesses. Accordingly, his Batson claim is unsubstantiated.

Defendant concludes that the cumulative effect of the alleged errors occurring during jury selection deprived him of his constitutional rights. None of his claims have individual merit and, therefore, cannot combine to establish prejudicial error. *See People v. Albanese*, 102 Ill.2d 54, 82-83, 79 Ill.Dec. 608, 464 N.E.2d 206 (1984).

II

Defendant next claims that the circuit court erred in refusing to question individual jurors as to possible conversations with another juror.

On the second day of trial, after several witnesses had testified, the circuit court was informed that a juror had communicated with an assistant state's attorney (ASA) who was not involved in the case. Outside the

presence of the jury, the court then questioned the juror, Brenda Smith, who explained that she had telephoned the ASA because she "was just worried about this case and where it's going and what could happen to [her] as well as * * * family members [and] just wanted to know if there was anything [she] could do to take [herself] out of it." The court determined that the ASA had refused to speak with Juror Smith and had told her "to make the best of it"; nevertheless, the court inquired further as to whether Juror Smith had "discussed [her concerns] with anybody else." Although Smith initially answered "no," when asked whether she had "discussed any of this with your fellow jurors," Smith later answered, "Yeah. I mean, I guess – yeah. There have been times when we have said things or whatever when we walk in and we look at each other and kind of, you know, wow, that was, you know – ."

The circuit court then interrupted Juror Smith, stating "That's not a discussion" to which Smith agreed: "No I guess not then." A lengthy colloquy then took place between the court and Smith, in which the court specifically questioned Smith regarding whether she had expressed her fears and concerns to the other jurors. In her answers, Smith vacillated, claiming that she and the other jurors "lightheartedly" spoke about being around after the trial to exchange Christmas cards. Smith nevertheless acknowledged that she did "not really [have] conversations" about her fears, she only discussed her trouble "sleeping at night." The circuit court then asked Juror Smith if her feelings would prevent her from deciding the case based upon the evidence and the law; her response was equivocal. Defendant asked the court to

remove Juror Smith and also moved for a mistrial, contending that the entire jury had been "poisoned." Defendant also suggested that the court question the other jurors as to possible conversations with Juror Smith. The court refused, finding that Juror Smith had not expressed or verbalized her concerns to the other jurors. The court did, however, excuse Juror Smith from defendant's jury.

As a rule, it is improper for jurors to discuss among themselves the case or any subject connected to the case until all the evidence has been presented and after receiving final instructions. *People v. Cloutier*, 178 Ill.2d 141, 160-61, 227 Ill.Dec. 448, 687 N.E.2d 930 (1997). Nevertheless, "under certain circumstances discussions of evidence among jurors before the final submission of a criminal case have been deemed not to have been improper, or as not having resulted in prejudicial error where, for instance, a review of the jurors' responses to questions of the trial court indicated that the jurors' impartiality had not been affected by their discussions among themselves of certain exhibits prior to deliberations." *Cloutier*, 178 Ill.2d at 161, 227 Ill.Dec. 448, 687 N.E.2d 930, quoting 75B Am.Jur. Trial § 1610, at 379-80 (1992).

The circuit court deemed an inquiry among other jurors as to Juror Smith's conduct a potential "Pandora's box," because of its finding that Juror Smith had not expressly admitted to communicating to the other jurors about her fears or the case. *See, e.g., Cloutier*, 178 Ill.2d at 161, 227 Ill.Dec. 448, 687 N.E.2d 930. The court's declination to question the other jurors as to whether Juror Smith had expressed her fears or concerns was not reversible error. The court was in the best position to judge Juror

Smith's responses. Given that Juror Smith never indicated that she actually had discussion with the other jurors about the case, its facts, or her own fears, the court did not abuse its discretion.

III

Defendant urges that he was denied a fair trial by the admission of "other crimes" evidence concerning the Judge Wilson bribe. He claims that the State presented a "mini-trial" on the issues of the bribery, therefore depriving him of a fair trial.

Although inadmissible to show a propensity to commit crimes, other crimes evidence may be admissible to show consciousness of guilt. *People v. Bean*, 137 Ill.2d 65, 107-08, 147 Ill.Dec. 891, 560 N.E.2d 258 (1990). Whether to admit or exclude other crimes evidence rests within the discretion of the circuit court and that decision will not be reversed absent abuse. *People v. Kliner*, 185 Ill.2d 81, 146, 235 Ill.Dec. 667, 705 N.E.2d 850 (1998); *People v. Illgen*, 145 Ill.2d 353, 364, 164 Ill.Dec. 599, 583 N.E.2d 515 (1991). Here, the evidence of the bribe, although prejudicial, was clearly probative and relevant to show defendant's consciousness of guilt.

Defendant claims that Cooley's testimony had attenuated probative value "since the bribe was orchestrated not by [defendant], but by third parties." The record reveals, however, that on several occasions, Cooley met with defendant and the two discussed the bribery of Judge Wilson. Defendant's attempt to distance himself from the actual bribery falls short and is not supported by the record.

Defendant also claims that the evidence of the bribery constituted an unacceptable "mini-trial," which caused him manifest prejudice. He asserts that Cooley's testimony, rather than simply recounting the bribery, provided the jury with a story of police and judicial corruption, clandestine meetings during which payoffs took place, threats by "dangerous" people, a conspiracy in the "First Ward," and the imprisonment of a number of "First Ward" associates. The State counters that the extensive evidence of the bribery conspiracy was presented, in part, in response to defendant's theory of the case that the bribery never took place but, if it had, he did not participate.

The admission of other crimes evidence, although relevant, should not lead to a "mini-trial" of a collateral offense. *People v. Nunley*, 271 Ill.App.3d 427, 432, 208 Ill.Dec. 93, 648 N.E.2d 1015 (1995). The circuit court therefore must carefully limit the details to what is necessary to illuminate the issue for which the other crime was introduced. *People v. Bartall*, 98 Ill.2d 294, 315, 74 Ill.Dec. 557, 456 N.E.2d 59 (1983); *People v. Chambers*, 259 Ill.App.3d 631, 634-35, 197 Ill.Dec. 595, 631 N.E.2d 817 (1994). Erroneously admitted evidence of other crimes requires reversal unless the record affirmatively establishes acceptable justification. *People v. Thigpen*, 306 Ill.App.3d 29, 39, 239 Ill.Dec. 102, 713 N.E.2d 633 (1999).

In the present case, the circuit court carefully limited the evidence of the bribery, excluding all references to organized crime or defendant's connections to the "Mafia." Further, the court explicitly instructed the jury, during Cooley's testimony and again at the close of the case, that the purpose of admitting the bribery evidence

related only to defendant's consciousness of guilt and the relationships with other witnesses. Although Cooley's testimony relating the facts of the bribery was extensive, and the State focused on that evidence, it cannot be said that the court abused its discretion in allowing the bribery testimony. That testimony of necessity explicated the delay in bringing defendant to trial almost 25 years after the offense; explained defendant's initial acquittal; and ineluctably revealed defendant's consciousness of guilt. Evidence concerning the conspiracy and the individuals involved in that conspiracy was essential to explain defendant's role as a participant in the bribery of Judge Wilson. For these reasons, defendant's argument is defeated.

IV

Defendant further claims that he was denied a fair trial by the State's allegedly veiled references to organized crime.

Resolving questions concerning the admissibility of evidence rests within the sound discretion of the circuit court and its decision will not be disturbed "absent a clear abuse of discretion resulting in manifest prejudice." *People v. Lucas*, 151 Ill.2d 461, 489, 177 Ill.Dec. 390, 603 N.E.2d 460 (1992). The decision to deny a mistrial also is within the discretion of the court and will not be reversed unless a clear abuse of that discretion is manifest. *People v. Hall*, 114 Ill.2d 376, 405, 102 Ill.Dec. 322, 499 N.E.2d 1335 (1986). A mistrial should be granted only where the jury has been so influenced and prejudiced that it would not be fair and impartial and that the damaging effect of

the evidence cannot be remedied by admonitions or instructions. *People v. Camden*, 219 Ill.App.3d 124, 136, 161 Ill.Dec. 565, 578 N.E.2d 1211 (1991).

In the case sub judice, the circuit court excluded all references to organized crime. The court allowed references to the "First Ward" political organization, however. In compliance with this limitation, no specific "mafia" or "mob" references were made. Nevertheless, defendant insists that the State's conduct in adducing evidence, both from its own witnesses and in cross-examination of defense witnesses, injected thinly-veiled references to organized crime into the trial. Defendant also points to the State's cross-examination of defense witness Ed Whalen, Jr. in which the State asked him if he knew whether his uncle also had represented a "brother named Spilotro" and Joey Aiuppa, "a big guy in the First Ward." The State also asked Phyllis Napoles, Logan's ex-wife and defendant's cousin, if defendant's uncle was Joe Ferriola and whether Ferriola was a First Ward member.

The record clearly shows that evidence concerning the "First Ward" and its members and associates played a large part in defendant's trial. Nevertheless, defendant's contention, that only a "group of dimwits" would miss the organized crime references, must fail. Simply because certain individuals involved in the bribery conspiracy were also associated with organized crime is no reason to redact those persons from the facts of this case.

Ironically, in his assertions of error, defendant essentially attempts to rewrite history, decrying references to anyone remotely associated with organized crime; yet he used those individuals, for example, blaming Petrocelli

for Logan's murder, to fit his defense. Much of the evidence of which defendant complains was elicited through defense questioning: Cooley's gambling debts and threats received from First Ward associates were elicited on cross-examination.

Here, naming the "players" in the conspiracy and criminal plot did not constitute reversible error. Defendant's argument misses the mark.

V

Defendant next contends that he was denied a fair trial by multiple instances of improper prosecutorial argument, including inflammatory comments about defendant, attacks on defense counsels' integrity and reference to defendant's failure to testify.

A prosecutor is given considerable leeway in making closing and rebuttal argument and is allowed to argue the evidence and reasonable inferences drawn from that evidence. *People v. Gutirrez*, 205 Ill.App.3d 231, 261, 151 Ill.Dec. 395, 564 N.E.2d 850 (1990). It is entirely proper for the prosecution to denounce a defendant's behavior, engage in some degree of invective and draw inferences unfavorable to the defendant if such inferences are based upon the evidence. *People v. Bunting*, 104 Ill.App.3d 291, 296, 60 Ill.Dec. 51, 432 N.E.2d 950 (1982). In determining whether a prosecutor's closing comments are prejudicial, reference must be made to the entire argument, to the context of the language used, its relation to the evidence and the effect of the argument on the rights of the defendant to a fair and impartial trial. *People v. Kitchen*, 159 Ill.2d 1, 38-39, 201 Ill.Dec. 1, 636 N.E.2d 433 (1994). The

character and scope of closing argument is left largely to the circuit court and every reasonable presumption must be indulged that the court properly exercised its discretion. *People v. Morgan*, 112 Ill.2d 111, 113, 97 Ill.Dec. 430, 492 N.E.2d 1303 (1986). Defendant shoulders a heavy burden of persuasion in seeking to reverse a conviction on the ground of improper argument; only if the challenged remarks constituted a material factor in the conviction, without which the jury might have reached a different verdict, is reversal merited. *People v. Lann*, 194 Ill.App.3d 623, 628, 141 Ill.Dec. 283, 551 N.E.2d 276 (1990). The dispositive question in the case at bar, therefore, is whether the prosecutor's argument resulted in substantial prejudice to defendant, and constituted a material factor in his convictions without which the jury's verdict might have been different.

Here, the prosecutor's negative references to defendant were palpable; he said, "You may think you see his personality, and the way he acts over here for the show. But you know, his personality it that of a hitman." This reference to defendant as a "hitman" was an improper attempt to draw a connection between defendant and an organized crime syndicate, in circumvention of the circuit court's order barring such references. The prosecutor also exceeded the bounds of proper argument by his negative portrayal of defense counsel: "But what [defendant's] attorneys have done is not unlike want was done in 1977 when it went to trial. Different form, different style. But they don't want you to follow the law." Nothing in the evidence presented at trial or in defense argument precipitated such an argument.

Of greatest concern, however, are the prosecutor's comments that "[Defendant]'s the only one in this room who didn't come on this witness stand and talk about accepting responsibility. And again, the defendant does not have to testify. * * * But those other witnesses told you about their accepting of their responsibility." In addition, the prosecutor theorized about the possibility of a third shot, but stated that only defendant "knows." Taken as a whole, those comments reflect a calculated attempt to draw attention to defendant's invocation of his right of refusal to testify. This line of argument had the greatest potential for prejudicing the defense and for denying defendant a fair trial. *See People v. Hawkins*, 284 Ill.App.3d 1011, 221 Ill.Dec. 447, 675 N.E.2d 642 (1996); *People v. Tipton*, 222 Ill.App.3d 657, 661-62, 165 Ill.Dec. 131, 584 N.E.2d 310 (1991).

The State attempts to minimize the nature of the argument and its effect, asserting that, because the circuit court sustained a defense objection to the State's comment on defendant's failure to testify, any error was cured. Argument made by the prosecutor, attempting to emphasize defendant's failure to testify at trial, however, clearly constituted prosecutorial misconduct. Nevertheless, those comments, to which objections were sustained by the circuit court, must be juxtaposed with the numerous instances in which both the court and the attorneys advised and instructed the jury that defendant was not required to testify. *See People v. Lawler*, 142 Ill.2d 548, 564, 154 Ill.Dec. 674, 568 N.E.2d 895 (1991) (jury instructions had curative effect on improper argument because arguments of counsel do not have the same impact on the jury as do the jury instructions); *People v.*

Harris, 132 Ill.2d 366, 386, 138 Ill.Dec. 620, 547 N.E.2d 1241 (1989).

On numerous occasions during jury selection, both the circuit court and attorneys emphasized defendant's right to refuse to testify. During the second phase, or general, voir dire, the court instructed the entire venire that defendant, innocent until the State proves him guilty beyond a reasonable doubt, need not testify. Likewise, the court and defense counsel, on a number of occasions addressed defendant's right not to testify. After the jury was selected and sworn, but before evidence was presented, the court again advised the jurors of defendant's right not to testify. Following presentation of the evidence, in the State's closing argument, the prosecutor also emphasized defendant's right not to testify: "And again * * * [defendant] doesn't have to put up a defense." Finally, the court instructed the jury as to defendant's presumption of innocence and his right not to testify: "The defendant is presumed to be innocent of the charge against him, and this presumption remains with him throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that he is guilty. The [S]tate has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the [S]tate throughout the case. The defendant is not required to prove his innocence." The court also instructed the jury: "The fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict." Notwithstanding the curative effect of these remarks and instructions to the jury, defendant insists he

was denied a fair trial, relying upon *People v. Blue*, 189 Ill.2d 99, 244 Ill.Dec. 32, 724 N.E.2d 920 (2000).[4]

Unlike *Blue*, the errors attributable to the prosecutor's closing argument in the case sub judice did not attain the level demonstrated in *Blue* nor did those errors prejudice defendant's right to a fair trial. A review of the record reveals that, despite the conduct by the prosecutor, the evidence presented at trial overwhelmingly implicated defendant in Logan's murder. The circuit court promptly sustained objections to the improper argument and curatively instructed the jury. Accordingly, given the manifest weight of evidence demonstrating defendant's

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[4] In *Blue*, the supreme court held that errors committed at the defendant's trial "cast doubt upon the reliability of the judicial process" and "created a pervasive pattern of unfair prejudice." *Blue*, slip op. at 33, 189 Ill.2d at ___, 244 Ill.Dec. 32, 724 N.E.2d 920. Accordingly, the *Blue* court reversed the defendant's conviction for shooting and killing a police officer. Errors occurring at trial included the improper introduction and display of the dead officer's bloodied uniform, the inflammatory testimony of the victim's father highlighting the poignancy of the family's loss, the inflammatory testimony from a police commander regarding the oath which the victim took, "testifying" by the prosecutors, and improper argument by the prosecutors that the victim's family needed to "hear" from the jury and that the jury should also send a "message" of its support to the police. Finding that the cumulative effect of these errors denied the defendant a fair trial, the court further emphasized the State's "overbearing conduct in pursuit of defendant's convictions" and its unprofessional and improper behavior at trial. *Blue*, slip op. at 34-35, 189 Ill.2d at ___, 244 Ill.Dec. 32, 724 N.E.2d 920.

guilt, and the court's corrective measures, the prosecutor's comments cannot be said to have altered the outcome of trial.

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.

THEIS, P.J., and GREIMAN, J., concur.

APPENDIX B

FIFTH DIVISION
MARCH 31, 2000

1-98-0047

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	Appeal from the Circuit Court of Cook County.
v.	No. 93 CR 28787
HARRY ALEMAN, Defendant-Appellant.	Honorable Michael P. Toomin, Judge Presiding.

ORDER

A jury found defendant Harry Aleman guilty of first-degree murder and he was subsequently sentenced to a term of 100 to 300 years' imprisonment.[1] Defendant

[1] On September 27, 1972, Billy Logan was shot to death on West Walton Street in Chicago. In December 1976, defendant was indicted for Logan's murder. Following a bench trial before Judge Frank Wilson in May of 1977, defendant was acquitted. Several years thereafter, federal investigators uncovered evidence that Judge Wilson had accepted a $10,000 bribe to find defendant not guilty. In February 1990, two months after Judge Wilson was informed by the FBI of the investigation into bribery, he committed suicide. In December 1993, defendant

appeals from his second trial; among errors he identifies are: (1) errors occurring during voir dire deprived him of a fair trial; (2) the court erred in refusing to question individual jurors as to possible conversations with another juror; (3) the court erred in imposing certain security measures in the courtroom; (4) he was denied a fair trial by the admission of "other crimes" evidence regarding judicial bribery; (5) he was denied a fair trial by the State's alleged references to organized crime; (6) he was denied a fair trial in the admission of impeachment evidence indicating that he had committed a home invasion with an accomplice; (7) he was denied a fair trial where his attorney, in opening statement, referred to the testimony of a possible State witness who did not testify; (8) he was denied a fair trial where a witness testified that the judge in defendant's previous murder trial committed suicide; (9) alleged prosecutorial misconduct at argument denied him a fair trial; (10) the court erred in refusing to grant his defense counsel a two-week continuance; (11) the court abused its discretion in limiting his cross-examination of State witnesses; (12) the court abused its discretion in curtailing the testimony of a defense expert; (13) the court erred in finding that the

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was again indicted for Logan's murder. Although he sought to dismiss the indictment through the application of double jeopardy principles, the circuit court held that double jeopardy did not bar re-indictment or re-prosecution. This court affirmed (see *People v. Aleman*, 281 Ill. App. 3d 991, 667 N.E.2d 615 (1996)); accordingly, defendant was retried, from which result the present appeal is taken.

previous judge's suicide was admissible as rebuttal evidence if defendant chose to seek admission of the previous judge's specific findings; (14) he was denied due process as a result of alleged error occurring at his suppression hearing; and (15) issues relating to re-indictment and re-prosecution (double jeopardy, speedy trial) must be reconsidered in light of "new evidence." Issues (1), (2), (4), (5) and (9) are considered in an opinion disseminated contemporaneously with this order. Issues (3), (6) through (8), and (10) through (15) will be determined in this separate Supreme Court Rule 23 order.

In the case *sub judice*, the 23-volume record reflects that on retrial, the State presented evidence from several witnesses regarding Logan's murder. Logan lived with his sister, Betty Romo, and another sister. On September 27, 1972, Logan left for work at 11 p.m. Shortly after, Romo heard three loud noises or shots. Running outside, she discovered Logan, bleeding from two fatal shotgun wounds. Logan had been divorced from defendant's second cousin, Phyllis Napoles. They were engaged in a custody battle. Previously, he had been arrested for her assault and battery.

Bobby Lowe, Logan's neighbor, testified that on September 27, while walking his dog, he observed a vehicle parked across the street with its engine running and Logan walking to his parked automobile. As Lowe approached Logan to speak with him, the other vehicle pulled up. Lowe heard two loud noises and saw Logan fly backwards. Defendant exited the passenger side of the vehicle, approached Logan with a gun-like object in his hand, which he pointed at the fallen Logan. Lowe stared at defendant for four or five seconds, standing three or

four feet away, then turned and ran. While running, he heard another loud noise and heard the vehicle drive away. In 1972, he picked out defendant's photograph and again, in 1976, he identified defendant as Logan's shooter for police. As a result of witnessing the shooting, Lowe was forced to quit his job and was relocated. He received money from the State during both trials. Lowe had incurred many debts, which he paid in part with money received from the State.

Louis Almeida, a career criminal who had grown up in the same neighborhood as defendant, testified for the State. In March of 1975, while driving through Ohio on their way to "kill somebody" for $10,000 in Pennsylvania, he and Joe Neri were stopped by Ohio police and arrested for possession of weapons and a silencer. Almeida provided police with information about his various criminal activities, including armed robberies, vehicle thefts, and bombings. Later, he reported details of Logan's murder identifying himself as the driver and defendant as the shooter. In exchange, Almeida was given immunity from prosecution for Logan's murder.

According to Almeida, in August of 1972, defendant discussed his plan to kill Logan and gave him two license plate numbers and Logan's home and work addresses, writing "Death to Billy" on the same piece of paper. Almeida then trailed Logan to learn his habits and schedule.

On the evening of September 27, 1972, defendant, armed with a shotgun and a .45 caliber handgun, was driven by Almeida to Logan's block, where he parked. Almeida observed a man walking a dog. At 11:15 p.m., he

saw Logan. Almeida drove the automobile near Logan. Defendant called to Logan. Logan walked toward them. Defendant shot him twice with a 12-gauge shotgun. Logan "flew back" and began crawling and yelling for a doctor. Defendant stepped half-way out of the car, but "shut the door on the car and [said], let's go, he's gone."

The State then presented evidence regarding defendant's 1977 trial for Logan's murder, which resulted in acquittal. Robert Cooley, a former Chicago Police Officer and attorney during the late 1970's, testified that while he was a police officer, and also later when he practiced criminal law, he often bribed judges, clerks and sheriffs. While an attorney, Cooley visited the "Counselor's Row" restaurant, which members of Chicago's "First Ward" political organization frequented.

In February 1977, Cooley met with First Ward secretary Pat Marcy and ward committeeman John D'Arco, Sr. Marcy told Cooley of defendant's "murder case" and asked him if he knew of a judge who could "handle it," or fix the case. Cooley described Judge Wilson as a "very close" friend but a "drinker" who might need the money.[2] Cooley approached Wilson, who initially informed Cooley that he had been "SOJ'd"[3] and was unable to help. Cooley later told Wilson the case against defendant was weak, it could be handled very easily, and that Cooley would pay him $10,000 for an acquittal should the case be reassigned to Wilson. Wilson later agreed to "handle" the

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[2] Cooley also testified that Judge Wilson was "very straight" and a "stateminded" judge, who, to his knowledge, had never accepted a bribe.

[3] Referring to a motion for substitution of judge.

case if Tom Maloney, then defendant's attorney, withdrew his SOJ motion and withdrew from the case; he also asked that Cooley not represent defendant, to avoid any appearance of impropriety. Cooley then gave $2,500 to Wilson, the remaining $7,500 to be paid when the trial was over.

After paying Judge Wilson, Cooley met with defendant and another man, Marco D'Amico, assuring them both that the case had been fixed and that Wilson would acquit defendant. Cooley told them of Wilson's conditions. It was agreed that Frank Whalen, a former Chicago attorney living in Florida, would represent defendant, and Cooley met Whalen at the Bismark Hotel in April 1977. There, Cooley told Whalen that Wilson was going to "throw the case out," but wanted no contact with Whalen. Cooley would act as middleman; Whalen agreed.

Cooley again met with defendant, who told him that Maloney had "come up with an alibi" for the night of Logan's murder, that defendant had been hitting golf balls with three or four friends. Defendant also stated that "somebody" had "gotten to" police investigators and some of the police reports would not "make it" to court. Cooley and defendant met again. Butch Petrocelli was present. Defendant informed Cooley that a female witness to the Logan murder had accepted $10,000 to testify that defendant had not done the shooting. Cooley later informed Judge Wilson about this witness, who thought that was a good idea. Cooley did not, however, inform Wilson of the $10,000 witness payment. Cooley then met Whalen in Florida a week before the trial and again assured him that Wilson would throw the case out.

On the second day of the 1977 trial, Cooley met Judge Wilson, who was very upset because the case was not as weak as represented and Whalen was not doing a good job. Cooley warned Wilson to follow through with the deal. The next day, Cooley told Marcy of this development; Marcy responded that Wilson had better do as agreed.

Cooley again met with Judge Wilson. Wilson had discovered that the female witness was receiving $10,000 for testifying falsely. He complained of receiving $10,000 although he was a "full circuit judge," and requested more bribe money. Cooley told Wilson he would see what he could do, but to fulfil [sic] his part of the deal or both would be in a great deal of trouble. Cooley then met with Marcy again, addressing Wilson's demand; Marcy refused additional payment.

On May 24, 1977, Judge Wilson acquitted defendant of Logan's murder. Marcy then gave Cooley two envelopes; one contained $7,500 for Wilson and the other held $3,000 for Cooley. That evening, Cooley met Wilson at a restaurant. In the men's room, Cooley gave Wilson the remaining $7,500 of the bribe. Wilson said [sic] was a "broken man" and that Cooley had "destroyed" and "killed" him.

A few weeks later, defendant, while with Petrocelli, thanked Cooley, telling him that he had done a great job, and asked Cooley for a few of his business cards so that he could send him more clients.

On cross-examination, Cooley testified, among other things, that since 1986 he had been paid $3,400 per month by the government. He admitted having a heavy gambling habit and cheating on his taxes. The State rested.

Defendant presented the testimony of several witnesses, including William Dietrich, Billy Logan's nephew, and Stanley Ryba, Logan's neighbor, to challenge Lowe's account of the shooting. Dietrich, who was living with Logan on September 27, 1972, recalled being asleep on the front porch at 11 p.m. He awoke to hear someone say, "hey, Bill, come here." Immediately hearing two gunshots, he looked outside and saw Logan on his knees, falling backwards. He noticed a large vehicle, but no one else on the street at that time. Ryba, a neighbor of Logan's, testified that he was watching television in his home six houses away. At 11 p.m., he heard a gunshot, looked out his window and saw a car double-parked on the street and a man "down" nearby. No one else was in the area. Guido Calcagno, Almeida's life-long friend, testified for defendant that he had known Almeida since they were both children. Almeida was "not very truthful" with a "tendency to lie about everything." Several police officers who had investigated Logan's murder testified that Lowe initially was "reticent" and fearful who, at first, only identified the occupants of the automobile as two white males.

Logan's son, William Jr., and Phyllis Napoles, defendant's second cousin and Logan's ex-wife, also testified for defendant. They suggested that Petrocelli, not defendant, shot Logan. Napoles described Logan as an abusive drunk and characterized her relationship with Logan as "tumultuous." After her divorce from Logan in 1967, she had a relationship with Petrocelli, a "very violent" man with a "dark side." In March 1972, Logan, in a drunken state, kicked the door of her home and threatened her. Petrocelli, who was present, began arguing with Logan

and a violent physical confrontation ensued, during which Petrocelli threatened to kill Logan. Logan's son, William Jr., present during this fight, testified that he heard Petrocelli tell Logan that "he'll take him out."

The defense also presented the testimony of Ed Whalen, Jr., Frank Whalen's nephew, in questioning Cooley's account of Judge Wilson's bribe. Whalen, Jr. often helped his uncle with cases, including defendant's 1977 murder trial. His uncle, who had partially retired to Florida, stayed in a condominium in the Hancock Building, not the Bismark Hotel, whenever he came to Chicago. Whalen, Jr. never came into contact with Cooley during the 1977 trial. The trial was legitimate and not fixed. Neither Frank Whalen nor defendant ever indicated to Whalen, Jr. that the case had been predetermined.

The jury found defendant guilty and he was sentenced to a prison term of not less than 100 and not more than 300 years.

III

Defendant contends that he was denied a fair trial due to certain security measures imposed by the circuit court during trial.

Issues of courtroom security fall within the discretion of the circuit court and the most deferential standard of review is employed to determine the propriety of a court's procedure. *People v. Coleman*, 183 Ill. 2d 366, 387, 701 N.E.2d 1063 (1998); *People v. Wheeler*, 173 Ill. App. 3d

549, 552, 527 N.E.2d 1035 (1988); see also *People v. Bolla*, 114 Ill. App. 3d 442, 451-52, 448 N.E.2d 996 (1983).

In the present case, during jury selection, defendant objected to the placement of metal detectors outside the courtroom. The circuit court overruled his objection, pointing to the "legitimate security interest" of the case. Although not apparent from the record and not objected to at trial, defendant also claims that the jury was escorted in and out of the back door of the building, police cars with lights flashing blocked the streets, and police tape cordoned off a stairwell. Notwithstanding defendant's failure to provide a record evincing these "extraordinary" measures, his argument fails on its merits.

This high-profile case involved allegations of murder for hire, judicial bribery, and the witness protection program. See *People v. Steel*, 52 Ill. 2d 442, 454, 288 N.E.2d 355 (1972). Given the nature of the instant case, it cannot be said that the court erred in instituting additional security measures. In any event, there is nothing in the record to suggest that the jury was in any manner influenced or affected by the security measures.

VI

Defendant claims that he was denied a fair trial when evidence was admitted that he had committed a home invasion.

Here, the circuit court denied the State's request to preclude evidence regarding the prior criminal relationship between Almeida and Petrocelli; in so ruling, the

court recognized that the only relevance of this evidence was to suggest that Petrocelli, not defendant, had shot Logan. Accordingly, the court advised defendant that if he chose to present evidence of Petrocelli's prior commission of crimes with Almeida to infer that the two also committed the Logan murder, the State was entitled to offer rebuttal evidence that "Almeida and [defendant] were committing crimes about that time together as well."

During Almeida's testimony, the defense elicited testimony that Almeida and Petrocelli committed three bombings on one night in October 1972. The circuit court thereafter allowed the State to elicit testimony regarding Almeida's contemporaneous criminal activity with defendant. Specifically, Almeida answered, "[y]es," when asked by the State if he had committed a 1972 "home invasion" with defendant and Lennie Forester.

Clearly, through Napoles' testimony, defendant suggested to the jury that Petrocelli must have committed Logan's murder; he then bolstered this theory by portraying Petrocelli and Almeida as criminal cohorts. Responding, the State adduced evidence that defendant and Almeida also were cohorts, thereby rebutting the inference that only Almeida and Petrocelli, not Almeida and defendant, committed Logan's murder. Accordingly, no error occurred. See *People v. Thompkins*, 121 Ill. 2d 401, 444, 521 N.E.2d 38 (1988); *People v. Wright*, 261 Ill. App. 3d 772, 776, 632 N.E.2d 706 (1994).

VII

Defendant asserts that he was denied a fair trial when his attorney, in opening statement, referred to the inculpatory testimony of a potential State witness, who ultimately did not testify. He claims that his attorney would not have addressed this witness' possible testimony had the circuit court conducted a hearing in accord with *Massiah v. United States*, 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964) (*Massiah*).

Prior to trial, defendant sought to exclude the testimony of Monte Katz, a potential State witness to whom Aleman had purportedly confessed while both were incarcerated in the federal penitentiary. According to defendant, Katz had obtained defendant's confession while working as a government informant. Notwithstanding defendant's position, the circuit court refused to conduct a *Massiah* hearing on this issue, instead ruling that Katz' testimony was admissible. Defendant claims that, had the court not improperly ruled thus, he would not have addressed preemptively Katz' testimony.[4]

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[4] In opening statement, defense counsel advised the jury that the State *might* present the testimony of Monte Katz, stating:

> "Monte Katz was an inmate at Oxford Federal Correctional Institution. Harry Aleman was an inmate at Oxford Federal Correctional Institution at the same time. And he claims that Harry Aleman after he was indicted confessed to the killing of William Logan.
>
> The evidence will show that Mr. Katz, who had gone by dozens of aliases, had a criminal record, was looking to get a time cut on his drug case and he will

Defendant asserts that the defense opening statement, made in reliance upon the court's improper ruling, deprived him of a fair trial.

Initially, it was defendant's own strategic choice to "front" Katz' purported testimony. See *People v. Hammond*, 35 Ill. App. 3d 370, 373, 342 N.E.2d 127 (1975). As the circuit court cogently emphasized,

> "I believe simply what that development illustrates is the fluidity of trial practice and moreover a fundamental concept that lawyers should not anticipate an opponent's strategy. When one chooses to do that they suffer the indignity that follows. In this case the State decided not to call * * * Katz and they had a right to do that. There is no evidence that any due process or sandbagging, as it was entitled, was the basis for what the State did here."

It was defendant's attempt to anticipate the State's presentation of its case, not the court's previous ruling regarding the admissibility of Katz' testimony, that created this situation.

Nevertheless, defendant attempts to blame his own conduct upon the ruling of the circuit court. Aside from

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come in and testify as to what he claims Mr. Aleman said.

You will be able to judge the credibility of Katz * * * as you will judge the credibility of all witnesses.

The evidence will be that Mr. Katz in fact got his freedom as many of the witnesses here have, including Almeida, immunity for a murder case and his other criminal activities[.]"

the attenuated causal connection between the court's ruling and defendant's strategic choice, the court's denial of defendant's request for a *Massiah* hearing was proper. A court "does not have to hold an evidentiary hearing on a motion just because a party asks for one. An evidentiary hearing is necessary only if the party requesting the hearing raises a significant, disputed factual issue." *United States v. Sophie*, 900 F. 2d 1064, 1071 (7th Cir. 1990); see also *United States v. Miller*, 116 F.3d 641, 665-67 (2nd Cir. 1997). Here, defendant failed to demonstrate his entitlement to a hearing; the court's denial, therefore, was proper.

VIII

Defendant maintains that he was denied a fair trial when a State witness testified that a "judge" committed suicide. He claims that this "gratuitous comment was prejudicial, especially so when considered in conjunction with the other prejudicial matter in this record."

In the instant case, the circuit court initially excluded evidence regarding Judge Wilson's suicide, on relevance grounds. Later, during defendant's cross-examination of Lowe, that witness mentioned a suicide. Specifically, after defendant asked Lowe when he received "money [from the State] after 1978," the witness responded, "[w]hen I heard about the lawyer – the judge killing himself, sir. They relocated me." No objection was made at the time. Later, after defendant moved for a mistrial, the court refused, finding "at this point that it has [not] enured [sic] to the prejudice of [defendant] to the point where a mistrial is warranted."

The decision to deny a mistrial is within the province of the circuit court and will not be reversed absent an abuse of discretion. *People v. Simpson*, 286 Ill. App. 3d 1034, 1038, 678 N.E.2d 74 (1997). Here, defendant offers no specific argument as to how he suffered prejudice. Moreover, Lowe's reference to "the judge" and "suicide" was vague: neither defendant nor Judge Wilson were mentioned. There was no prejudicial error.

X

Defendant urges a denial of due process when the circuit court refused a defense request for a two-week continuance.

The grant or denial of a continuance rests within the sound discretion of the circuit court. *People v. Young*, 128 Ill. 2d 1, 26-27, 538 N.E.2d 453 (1989). A right to a continuance is not an absolute right and, in the absence of a showing of prejudice, no abuse of discretion will be found. *People v. Killings*, 150 Ill. App. 3d 900, 906, 501 N.E.2d 1363 (1986).

In the instant case, on August 19, 1997, defendant sought a two-week continuance, alleging that discovery was not yet complete. The circuit court denied the motion, finding that the trial date of September 22, 1997, had been set for months and that the State had been extraordinarily diligent in complying with all discovery requests. Although defendant complained that he had not received certain requested documents in the control of the federal government, the State made every effort to communicate with the federal authorities to ensure their cooperation. A review of the instant case, therefore,

reveals that defendant was not prejudiced by the court's refusal to grant a two-week continuance. Defendant has provided no support in the record for his claim that the court's ruling prejudiced him.

XI

Defendant next claims that the circuit court abused its discretion by "curtailing" his cross-examination of two State witnesses. Specifically, he argues that he was not allowed to question Lowe about money received from the State, Lowe's 1985 theft conviction, and a series of thefts Lowe allegedly committed between 1984 and 1987. He further asserts that he was barred from impeaching Almeida with documents relating to Almeida's 1975 motion for a reduction of sentence in federal court, unlawful use of a weapon and violation of bail bond charges from 1985, and psychiatric history.

It is within the circuit court's discretion to determine the proper scope and breadth of cross-examination, and such determination will not be reversed in the absence of its clear abuse, resulting in manifest prejudice to a defendant. *People v. Terrell*, 185 Ill. 2d 467, 498, 708 N.E.2d 309 (1998). Here, the court's determination to bar 1985 convictions was proper (*People v. Montgomery*, 47 Ill. 2d 510, 268 N.E.2d 695 (1971)), as was the court's determination to bar evidence of uncharged thefts (*People v. Johnson*, 239 Ill. App. 3d 1064, 608 N.E.2d 36 (1992)).

Defendant was afforded extensive cross-examination regarding Almeida's mental health problems and his attempt at suicide in prison. Likewise, defendant cross-examined Almeida as to his cooperation with federal

investigators and his attempts to reduce his sentence. Further, defendant thoroughly cross-examined Lowe as to all monies he had received from the State and his financial and personal problems. Accordingly, defendant's assertion of error is rejected.

XII

Defendant next asserts that the circuit court abused its discretion by excluding a portion of a defense expert's testimony.

In the instant case, just prior to calling his expert, defendant sought to elicit his expert's opinion that a shotgun would not cause an individual to "fly" backwards. Defendant claimed that this testimony would contradict and cali into question both Lowe's and Almeida's account of Logan "flying back" after defendant shot him. The State objected to the admission of this opinion, pointing out that defendant had failed to disclose this portion of the expert's testimony. The circuit court barred the expert from testifying as to this opinion on the basis that defendant had failed to disclose this very specific testimony. Although defendant argued to the court that he had only just "discovered" his expert's opinion, the court found that,

> "This is a very distinct discovery violation here. And I think from the gist of your questioning earlier this week of Bobby Lowe and Almeida that you certainly had prior knowledge that this is what this man was going to say. And the State's attorneys certainly were not furnished with that prior to their putting these people on the witness stand."

The record supports the circuit court's ruling. On September 19, 1997, defense counsel faxed the State a single page representing the expert's testimony, which read as follows: "Herbert MacDonnell * * * is a criminologist who is of the opinion that the victim was shot with a shotgun, not a handgun. I have arranged for his testimony for Friday, September 26, 1997, on this point, as well as crime scene reconstruction." Defense counsel never submitted the expert's report. Not until September 26, 1997, did defense counsel disclose that the expert would also testify that an individual hit by a shotgun blast would not "fly back four or five feet." At this point the State objected.

Given the failure to comply with discovery rules, it cannot be said that the circuit court abused its discretion in limiting defendant's expert's testimony. *People v. Whalen*, 158 Ill. 2d 415, 634 N.E.2d 725 (1994).

XIII

Defendant additionally claims that the circuit court erred in finding that, if defendant sought to enter Judge Wilson's findings in defendant's first trial into evidence, the State could introduce evidence of Wilson's suicide. He claims that his "right to defend against the bribery allegation was also transgressed."

Defendant sought to introduce Judge Wilson's findings of fact from defendant's 1977 trial. Although the circuit court held that those findings were admissible, the court also determined that, if entered into evidence, those findings could be rebutted by evidence of Wilson's suicide. Specifically, the court stated:

> "[I]f the findings come in to show that [Judge Wilson] was on the up and up, it's going to open the door to what I have kept out already, and that is the period of time between '77 and '90, with Cooley going down there [to Judge Wilson's home in Arizona], being wired up and what have you, and then the ultimate discovery of [Judge Wilson's] body.
>
> * * *
>
> [I]f that's the gloss that [the defense] want[s] to put on [Judge Wilson's] findings, then [the State] should be entitled to bring in the aftermath[: t]hat [Judge Wilson] really didn't believe it was on the up and up because of what he did when he was confronted 11 years later."

Defendant insists that, in order to rebut the allegations of bribery, he was entitled to submit to the jury Judge Wilson's original, detailed findings supporting defendant's acquittal in the 1977 trial. Defendant posits that these detailed findings (delineating credibility determinations) would show that Judge Wilson was not bribed and that the first trial was not a sham. Defendant claims that the evidence of Judge Wilson's suicide is tangential to his findings and therefore not proper rebuttal evidence.

Nevertheless, as the circuit court determined, evidence of Judge Wilson's suicide, which occurred after the investigation into the bribery and after he was visited by Cooley and federal investigators and confronted by allegations of the bribery, was admissible to rebut defendant's claim that the bribery did not occur. It cannot be said that such determination was error.

XIV

Defendant insists that he was denied due process when the circuit court allowed the admission of Lowe's pre-trial and trial identification of defendant. He specifically complains that the court erred when it did not allow him to call Lowe as a witness in a pre-trial suppression hearing. He also asserts that because of the loss or destruction of certain records and pictures from the initial investigation, the court should have excluded Lowe's prior identification of defendant.

During pre-trial proceedings, defendant sought Lowe's appearance at the suppression hearing. After the State tendered a transcript of Lowe's prior testimony, the circuit court asked defendant what, if any, areas were not already covered in the transcript. Defense counsel's response, "I would hope that he would testify that there were two pictures of Aleman" was unpersuasive to the court given that the transcript contained Lowe's testimony that there were two pictures. Relying upon testimony from ASA Nick Iavarone and Chicago Police Detectives James Sesso, Ronald Mudre and Richard Law as well as a transcript of Lowe's prior sworn testimony, the court denied defendant's motion to suppress his identification as a product of an "illegal suggestive pre-trial procedure."

The circuit court's determination was not an abuse of discretion. See *People v. Moore*, 266 Ill. App. 3d 791, 640 N.E.2d 1256 (1994); *People v. Owens*, 46 Ill. App. 3d 978, 361 N.E.2d 644 (1977). The evidence at the suppression hearing revealed that, in 1972, after reviewing a series of books with photographs, Lowe identified defendant's

photo as Logan's shooter. Later in 1976, Lowe picked out defendant's photo from an array containing photos of six individuals. Only after choosing defendant's photo from this array, did police show Lowe another photo of defendant.

Given defendant's inability to provide a sufficient reason to merit Lowe's live testimony at the hearing and given the evidence adduced at the hearing, it cannot be said that the circuit court abused its discretion in denying defendant's motion to suppress Lowe's pre-trial identification of defendant.

XV

Defendant's final contention concerns double jeopardy and speedy trial issues already decided by this court in *Aleman*, 281 Ill. App. 3d 991. He maintains that the foregoing decision must be revisited due to "new evidence." He delineates no new evidence supporting his claim, however, and his invitation to revisit these issues therefore is rejected.

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.

HARTMAN, J., with THEIS, P.J., and GREIMAN, J., concurring.

APPENDIX C

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	No. 1-98-0047
Plaintiff-Appellee,	)	
v.	)	
HARRY ALEMAN,	)	
Defendant-Appellant.	)	

ORDER

(Order Entered May 25, 2000)

Upon consideration of Defendant-Appellant's petition for rehearing;

IT IS HEREBY ORDERED that the petition for rehearing be and the same is hereby DENIED.

/s/ Mary Jane Theis
JUSTICE

/s/ Allen Hartman
JUSTICE

/s/ Alan Greiman
JUSTICE

APPENDIX D

Harry ALEMAN, Petitioner-Appellant,

v.

THE HONORABLE JUDGES OF THE CIRCUIT COURT OF COOK COUNTY, Criminal Division, Illinois, Honorable Michael P. Toomin, Judge Presiding, Honorable Richard Devine, State's Attorney of Cook County, Illinois, Ernesto Velasco, Executive Director, Cook County Department of Corrections, Respondents-Appellees.

No. 97-2479.
United States Court of Appeals,
Seventh Circuit.

Argued Dec. 2, 1997.
Decided March 6, 1998.

Allan A. Ackerman, Chicago, IL, David I. Bruck (argued), Columbia, SC, for Harry Aleman.

Rita M. Novak, Office of the Attorney General, Chicago, IL, James E. Fitzgerald, John Blakey, Cook County State's Attorney, Chicago, IL, Renee G. Goldfarb (argued), Office of the State's Attorney of Cook County, Criminal Appeals Divison, Chicago, IL, for Circuit Court of Cook County, Illinois, Criminal Division, Michael P. Toomin, Judge, and Ernesto Velasco.

James E. Fitzgerald, John Blakey, Cook County State's Attorney, Chicago, IL, Renee G. Goldfarb (argued), Office of the State's Attorney of Cook County, Criminal Appeals Division, Chicago, IL, for Richard A. Devine.

Before WOOD, Jr., COFFEY, and FLAUM, Circuit Judges.

FLAUM, Circuit Judge.

Harry Aleman successfully bribed a Cook County Circuit Judge to acquit him of a murder charge in a 1977 bench trial. A grand jury returned a second indictment against Aleman on this murder charge in 1993 after evidence of the bribery surfaced. In addition, Aleman was indicted for the first time on a different murder charge. Aleman moved to dismiss both indictments, but the Illinois state courts rejected his arguments. In a lastditch effort to avoid (re)trial, Aleman requested a stay of state court proceedings while a federal district court considered his challenge to the indictments in a petition for a writ of habeas corpus. The case proceeded to trial after the district court denied this petition and motion to stay, and a Cook County jury convicted him of the Logan murder;[1] the trial judge thereafter sentenced Aleman to 100-300 years in prison. Aleman appeals the district court's denial of the petition. His conviction will stand, though, because we affirm the district court's denial of Aleman's petition.

I. BACKGROUND

While walking to work on the morning of September 27, 1972, William Logan was shot and killed by Harry Aleman. Three years later, in October 1975, Aleman also shot and killed Anthony Reitinger, allegedly because

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[1] The State has chosen not to proceed against Aleman on the Reitinger murder charge.

Reitinger neglected to pay a "street tax"[2] on his bookmaking operation to local organized crime figures. A grand jury indicted Aleman for the Logan murder in December 1976, but he was not charged at this time with the Reitinger murder. After numerous substitutions of counsel and judges, the Logan case proceeded to a bench trial before Cook County Circuit Court Judge Frank Wilson, who acquitted Aleman of the Logan murder in May 1977.

Nearly twenty years after the trial, however, two witnesses from the Federal Witness Protection Program were made available to testify that Aleman had murdered both Logan and Reitinger and that he had purchased the Logan acquittal with a $10,000 bribe to Judge Wilson. The first witness, Vincent Rizza, was a former Chicago police officer who ran an illegal bookmaking operation in order to supplement his government salary. Rizza paid a street tax to the local mafia and agreed to report bookmakers who were not making such payments to Aleman; one of the independent bookmakers whom Rizza offered up to Aleman was Anthony Reitinger. This evidence would provide a crucial link between Aleman and Reitinger's unsolved murder.

Rizza also supplied corroboration of Aleman's bribe of Judge Wilson in the Logan murder trial. In the early winter of 1977, after Aleman's indictment but before the trial, Aleman told Rizza that the trial was "all taken care of". Aleman said that he requested a bench trial "because

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[2] Street taxes are monies paid to criminal organizations in exchange for protection of the "taxpayer's" illegal operations from either law enforcement interference or mob takeover.

the case was all taken care of" and that this way he was not going to jail. Later, when newspaper accounts began to paint a bleak picture of Aleman's chances of gaining an acquittal, he again told Rizza calmly that the case was "taken care of".

The second federal government informant was Robert Cooley, a former lawyer steeped in corruption who admitted that he frequently bribed judges, prosecutors, clerks, and sheriffs before entering the Federal Witness Protection Program.[3] Cooley was a close friend of Judge Wilson and, at the request of some local organized crime figures, pitched the idea of a "fix" to Wilson. Cooley told Wilson that the case against Aleman was weak, that it could be handled very easily, and that an acquittal would be worth $10,000. Wilson agreed to fix the case if Aleman's counsel, Thomas Maloney, a good friend of Wilson's, would withdraw from the case in order to reduce the appearance of impropriety.[4] Cooley thereupon paid Wilson $2,500, and the two men agreed that Wilson would receive the remaining $7,500 after the

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[3] For a further discussion of Cooley's history of bribing public officials, see *United States v. Shields*, 999 F.2d 1090, 1093 (7th Cir.1993), cert. denied, 510 U.S. 1071, 114 S.Ct. 877, 127 L.Ed.2d 74 (1994).

[4] This also required Aleman to revoke his motion for substitution of judges, in which he had claimed that he could not receive a fair trial under Judges Wilson and James Bailey. The case was originally assigned to Judge Bailey, who had granted the motion and had transferred the case to Judge Fred Suria. After Wilson agreed to fix the case, Aleman revoked his motion for substitution and filed a motion to strike Judge Suria for cause. Judge Suria thereafter recused himself, and the case was transferred to Judge Wilson's docket.

acquittal. Unbeknownst to Wilson, Cooley had also arranged a $10,000 payment to secure the favorable testimony of an eyewitness to the murder. Cooley then met with Aleman and assured him that an acquittal was guaranteed.

The evidence against Aleman, however, was not as flimsy as Cooley had indicated to Judge Wilson. After the second day of trial, Cooley met with Wilson, who was upset at Cooley's misrepresentations and at the prosecutor's allegations that a witness had received $10,000 in exchange for offering false testimony. Amazingly, the issue for Wilson was not *whether* he would still acquit Aleman, but for *how much*. Wilson expressed annoyance that a witness was getting the same amount of money as a "full circuit judge"; he said to Cooley that he would "receive all kinds of heat" for the acquittal and requested more bribe money: "[T]hat's all I get is ten thousand dollars? I think I deserve more."

Throughout these meetings, the acquittal itself was never in question. Judge Wilson fulfilled his end of the bargain on May 24, 1977, when he acquitted Aleman in a brisk oral ruling and quickly exited the courtroom. Cooley's contacts in organized crime gave him a $3,000 "commission" for his work and an envelope containing $7,500 for Judge Wilson. Cooley and Wilson dined together at a restaurant soon after the trial, and, in the men's room, Cooley slipped Wilson the promised $7,500 envelope. Wilson expressed concern because the press was "all over" him about the seemingly inexplicable acquittal; he complained to Cooley: "That's all I'm going to get? I don't get any more than that?" Wilson then left the restaurant in frustration.

In addition to this extraordinary informant testimony, other evidence confirmed the bribery. An F.B.I. agent interviewed Judge Wilson at his retirement home in Arizona in November 1989. The agent informed Wilson that Cooley had become a government informant, that Cooley had secretly taped a recent conversation with Wilson in which the two men discussed the $10,000 Aleman bribe, and that the Government was currently investigating allegations that Wilson accepted a bribe to acquit Aleman. Wilson denied the accusations, but he failed to appear in Chicago for a grand jury subpoena concerning the matter on December 6, 1989. A few months later, Judge Wilson walked into the backyard of his home and shot himself to death.

Finally, Monte Katz, a friend of Aleman's in federal prison,[5] claimed that Aleman admitted that he murdered William Logan. Katz and Aleman became friends in prison, and, apparently, Aleman often discussed his criminal exploits. Specifically, Aleman told Katz that he "fixed" the Logan trial by paying money to "reach" the judge. Aleman stated that he was not worried about being tried again for the murder because it "was a double jeopardy situation."

The Circuit Court noted that the circumstantial evidence of a bribe was also significant. The record revealed "the rather curious spectacle" of Aleman, who originally

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[5] Aleman is currently serving a 12-year federal prison term on racketeering charges. *See United States v. DiDomenico*, 78 F.3d 294 (7th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 507, 136 L.Ed.2d 398 (1996) (affirming Aleman and his codefendants' convictions).

deemed Judge Wilson to be a prejudiced judge, within the passage of ten weeks, withdrawing his objection and allowing the case to be assigned to Wilson. In addition, Aleman was released from state custody on bond despite facing the state's most serious criminal charge, and the case proceeded to trial in less than five months from the date of his arraignment. The Circuit Court also took pause from the fact that Aleman's attorney, Frank Whalen, set the case for trial within six weeks of filing his appearance and requested no interim continuances to conduct the "adequate preparation one might reasonably anticipate in a case of this magnitude."

Based on this body of evidence, in December 1993, the Cook County State's Attorney again charged Aleman for the Logan murder and for the first time charged Aleman with the murder of Reitinger. A grand jury returned indictments on both counts. Aleman claimed to the Circuit Court, as he claims to us on appeal, that the Logan indictment violated the Double Jeopardy Clause and that the prejudicial pre-indictment delay on both charges violated his due process rights. After an evidentiary hearing concerning the alleged bribe, the Circuit Court rejected the double jeopardy argument based on the overwhelming factual evidence that Aleman's first trial was a sham. The Court emphasized its certainty that Aleman had bribed Judge Wilson:

> Although the court earlier observed that the State's burden was to establish the bribery by a preponderance of the evidence, the court also concurs in the State's appraisal that the evidence presented also meets the standard of proof beyond a reasonable doubt. Were this a

> prosecution for the substantive offense of bribery, the court would have little difficulty in concluding that the People had presented a credible and coherent case against the defendant. The evidence clearly establishes the tendering of money to a public officer to influence him in the performance of his duties.

(Citations omitted). Based on this factual finding, the Circuit Court held that there was no double jeopardy bar to reprosecuting Aleman for the Logan murder because there was never any jeopardy at the first trial. Furthermore, because crucial witnesses were not available at an earlier time, the court denied Aleman's claims of unconstitutional preindictment delay. These rulings were upheld on appeal. *See People v. Aleman*, 281 Ill.App.3d 991, 217 Ill.Dec. 526, 667 N.E.2d 615 (Ill.App.), *review denied*, 168 Ill.2d 600, 219 Ill.Dec. 567, 671 N.E.2d 734 (1996), *and cert. denied*, ___ U.S. ___, 117 S.Ct. 986, 136 L.Ed.2d 868 (1997). The district court below also rejected these contentions in Aleman's petition for a writ of habeas corpus. *United States ex rel. Aleman v. Circuit Court of Cook County*, 967 F.Supp. 1022 (N.D.Ill.1997).

II. DISCUSSION

Aleman raises three claims on appeal. First, he takes issue with the Circuit Court's factual findings that he bribed Judge Wilson in the Logan trial. Second, he challenges the effect of those factual findings upon his double jeopardy claim. *See Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) (holding that the protections of the Double Jeopardy Clause apply to the states). Finally, he urges us to recognize that the pre-indictment

delays of twenty-one and eighteen years in the Logan and Reitinger murders, respectively, violated his due process rights. Our collateral review, however, is quite limited. Under 28 U.S.C. § 2254(d)(1), we can only grant Aleman's petition if one of the Circuit Court's legal rulings was either "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." Aleman's factual challenge can succeed only if he can show by "clear and convincing evidence" that the Circuit Court's findings are erroneous. *See id.* § 2254(d)(2). He meets neither of these stringent standards.

A. *Double Jeopardy Claims*

Aleman's challenge to the Circuit Court's factual findings can be dismissed in short order. He rightly points out that the common law has always presumed the neutrality of judges. *See, e.g.*, 3 W. BLACKSTONE, COMMENTARIES ("[T]he law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."); *see also Del Vecchio v. Illinois Dep't of Corrections*, 31 F.3d 1363, 1372-73 (7th Cir.1994) (applying the common-law presumption), *cert. denied*, 514 U.S. 1037, 115 S.Ct. 1404, 131 L.Ed.2d 290 (1995). Aleman seems to think that reciting this principle alone can somehow overcome the great weight of evidence showing that he bribed Judge Wilson. However, we have always recognized that the presumption of a judge's neutrality is a rebuttable one. *See Del Vecchio*, 31 F.3d at 1373; *see also Bracy v. Gramley*, ___ U.S. ___, ___, 117 S.Ct.

1793, 1799, 138 L.Ed.2d 97 (1997). As in *Bracy*, the Circuit Court found that the ordinary presumption had been soundly rebutted in this case.

Beyond the presumption argument, Aleman argues that the State's witnesses were unreliable based solely on the length of time between the relevant events and the Circuit Court's evidentiary hearing. He relies on dicta from our decision in *Bracy v. Gramley*, 81 F.3d 684, 693 (7th Cir.1996), in which we commented that the petitioner did not show "good cause" for discovery because, in part, there would be a "pall of doubt" over the reliability of any exculpatory witnesses' testimony based on a fourteen-year interval between the events and an evidentiary hearing. *Id.* The Supreme Court, however, implicitly expressed its disapproval of this statement when overruling the case. *See* ___ U.S. ___, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). Aleman nevertheless tries to spin gold from this frayed strand. He notes that most of the key players in this story are deceased and, of those that are still living, the events occurred so long ago that their testimony is inherently unreliable.

Aleman's position on this point is flawed on many levels. First, the Supreme Court disagreed with our view of Bracy's ability to show good cause based on such testimony. Second, dicta from our *Bracy* opinion would not have established any sort of general rule that testimony concerning events from over fourteen years ago was presumptively unreliable. Such a rule would have called into question the constitutionality of countless statutes of limitations. Third, and most importantly, any alleged presumption of unreliability would have been rebutted in this case by the Circuit Court's evaluation of

the testimony. The Court heard the evidence and concluded that it was reliable "beyond a reasonable doubt". Aleman did not attempt to rebut the State's strong evidence with anything but vacuous and inapposite presumptions. This is a far cry from the "clear and convincing evidence" of factual error that we require before invalidating Circuit Court findings of fact.

Aleman's legal challenge presents a unique and interesting question, but it ultimately fares no better than his factual one. The Fifth Amendment's Double Jeopardy Clause guarantees that no one shall "be subject for the same offence to be twice put in jeopardy of life or limb." Aleman argues that the Double Jeopardy Clause unambiguously bars his reindictment on the Logan murder charge because he faced trial on that murder charge in 1977 and was acquitted by Judge Wilson. In support of his position, he points to a long line of Supreme Court cases reiterating that an acquittal on a charge absolutely bars retrial on that charge. *See, e.g., Arizona v. Washington,* 434 U.S. 497, 503, 98 S.Ct. 824, 829, 54 L.Ed.2d 717 (1978) ("The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. . . . If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair."); *Ball v. United States,* 163 U.S. 662, 671, 16 S.Ct. 1192, 1195, 41 L.Ed. 300 (1896) ("[I]n this country a verdict of acquittal . . . is a bar to a subsequent prosecution for the same offense."). Aleman argues that it is irrelevant *how* he obtained his acquittal and that there is no room for courts to question those circumstances and lift the double jeopardy bar to reprosecution. *See, e.g., Burks v. United States,*

437 U.S. 1, 11 n. 6, 98 S.Ct. 2141, 2147 n. 6, 57 L.Ed.2d 1 (1978) ("[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination."); *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 672, 7 L.Ed.2d 629 (1962) (stating that an acquittal triggers the protections of the Double Jeopardy Clause even if "the acquittal was based upon an egregiously erroneous foundation"). Aleman contends that the Circuit Court's decision is contrary to, or an unreasonable application, of this body of the Supreme Court's interpretations of federal law.

The legal conclusion urged by Aleman might not be an unreasonable application of Supreme Court precedent,[6] but the highly deferential standard of collateral review leads us to hold that the contrary interpretation – the one adopted by the Illinois courts in this case – is also not unreasonable. The Illinois courts viewed the authority cited by Aleman as begging the question; the Double Jeopardy Clause may well be absolute when it applies, *see Burks*, 437 U.S. at 11 n. 6, 98 S.Ct. at 2147 n. 6, but determining if it applies is the real issue in this case. Similarly, the State argues that the protections of the *Double* Jeopardy Clause only extend to a defendant who was once before in jeopardy of conviction on a particular

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[6] This case has inspired at least two scholarly commentaries reaching opposite conclusions. See Anne Bowen Poulin, *Double Jeopardy and Judicial Accountability: When is an Acquittal Not an Acquittal?*, 27 Ariz. St. L.J. 953 (1995); David S. Rudstein, *Double Jeopardy and the Fraudulently-Obtained Acquittal*, 60 Mo. L.Rev. 607 (1995).

criminal charge; the State contends that, by bribing Judge Wilson, Aleman created a situation in which he was never in jeopardy at his first trial. The first trial, therefore, was a sham and the acquittal there rendered has no effect for double jeopardy purposes. Under this theory, the State was free to re-indict him because he has never been in jeopardy of conviction on the Logan murder charge.

The Circuit Court concluded that Aleman's first trial was a nullity because he was never truly at risk of conviction. The Supreme Court has emphasized that "[j]eopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with criminal prosecution." *Breed v. Jones*, 421 U.S. 519, 528, 95 S.Ct. 1779, 1785, 44 L.Ed.2d 346 (1975); *see also United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S.Ct. 1349, 1353-54, 51 L.Ed.2d 642 (1977) ("The protections afforded by the [Double Jeopardy] Clause are implicated only when the accused has actually been placed in jeopardy.") (emphasis added); *Serfass v. United States*, 420 U.S. 377, 391-92, 95 S.Ct. 1055, 1064-65, 43 L.Ed.2d 265 (1975) ("Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy. . . . In particular, it has no significance in this context unless jeopardy has once attached and an accused has been subjected to the risk of conviction."); *Price v. Georgia*, 398 U.S. 323, 331, 90 S.Ct. 1757, 1762, 26 L.Ed.2d 300 (1970) ("The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict."). Indeed, the Court has stated that preventing the hazards associated with

risking conviction is the *raison d'etre* of the Double Jeopardy Clause:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223-24, 2 L.Ed.2d 199 (1957).

Aleman had to endure none of these risks because he "fixed" his case; the Circuit Court found that Aleman was so sanguine about the certainty of his acquittal that he went so far as to tell Vincent Rizza before the trial that jail was "not an option". Aleman may be correct that some risk of conviction still existed after Judge Wilson agreed to fix the case, but it cannot be said that the risk was the sort "traditionally associated" with an impartial criminal justice system.[7] *See Breed*, 421 U.S. at 528, 95 S.Ct. at 1785. It seems only appropriate that a defendant should not be

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[7] At oral argument, Aleman's counsel ominously forecast that the Illinois courts' rulings would lead to a plethora of "*Aleman* hearings" in which the State would assail the *extent* of the jeopardy to which a defendant was subjected in order to gain another bite at the proverbial apple. Let us be clear that we do not countenance the expansion of our (or the Illinois courts') holding in such a manner. Our holding is crafted to the unique circumstances of the instant case.

allowed to escape punishment for murder because he bribed the judge. To allow Aleman to profit from his bribery and escape all punishment for the Logan murder would be a perversion of justice, as well as establish an unseemly and dangerous incentive for criminal defendants. The Illinois courts' holdings, therefore, were not contrary to, or unreasonable applications of, federal law as interpreted by the Supreme Court.

For these reasons, we affirm the district court's rejection of the double jeopardy claims contained in Aleman's petition.

B. *Pre-indictment Delay*

The Supreme Court has recognized that, in extraordinary circumstances, the Fifth and Fourteenth Amendments' Due Process Clauses protect a defendant from oppressive and prejudicial preindictment delays. *See United States v. Lovasco*, 431 U.S. 783, 789-90, 97 S.Ct. 2044, 2048-49, 52 L.Ed.2d 752 (1977). Aleman urges us to invalidate his indictments for the Logan and Reitinger murders on this basis.[8] A grand jury indicted Aleman on both

[8] Aleman also argues that the indictments violated his Sixth Amendment right to a speedy trial. The Supreme Court, however, has held that this constitutional guarantee applies only to delays following arrest or indictment; the Sixth Amendment does not apply to investigative delays before that point. *See United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971) ("[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.").

murder charges in December 1993, which was more than 21 years after Logan's murder and over 18 years after Reitinger was shot to death. In order to succeed on his due process claim, Aleman must show that the delay caused him actual and substantial prejudice. *See United States v. Sowa*, 34 F.3d 447, 450 (7th Cir.1994), cert. denied, 513 U.S. 1117, 115 S.Ct. 915, 130 L.Ed.2d 796 (1995). If he makes that difficult showing, the Government must come forward with a justification for the delay, which the court will then balance against the prejudice established by Aleman. *See United States v. Canoy*, 38 F.3d 893, 902 (7th Cir.1994). Neither the Supreme Court nor our Circuit has ever held a pre-indictment delay to be unconstitutional, and Aleman's case will not be the first.

Aleman does not clear the initial, high hurdle of establishing actual and substantial prejudice from the pre-indictment delay. He again relies on presumptions instead of facts; he claims that he should enjoy a "presumption of prejudice" because, in the Sixth Amendment context, the Supreme Court has vacated a conviction in which a defendant did not receive a trial for more than eight years after his indictment. *See Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). Reasoning by strained analogy, he argues that we should similarly presume prejudice in the due process context from a longer, *pre-indictment* delay.

Aleman's argument, however, is based on a number of faulty premises, most notable of which is that there is no difference between a pre-indictment and post-indictment delay. The Supreme Court has explained that post-

arrest and/or post-indictment delays deserve close scrutiny because a defendant will likely be incarcerated during the time before his trial and will all the while carry the social stigma that accompanies public accusation without the chance to clear his name. *See Marion*, 404 U.S. at 321-22, 92 S.Ct. at 464. These dangers are simply not present in this case of pre-indictment delay. Furthermore, he makes the mistake of urging us to recognize a conclusive presumption in a due process inquiry, which the Supreme Court has frequently emphasized should be flexible and highly fact-specific. *See, e.g., Adamson v. California*, 332 U.S. 46, 68, 67 S.Ct. 1672, 1683-84, 91 L.Ed. 1903 (1947) (Frankfurter, J., concurring) ("These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia.").

Most importantly, Aleman's attempt to rely on a "presumption of prejudice" ignores our Circuit's law that "it is not enough . . . to offer some suggestion of speculative harm; rather, the defendant must present concrete evidence showing material harm" to his ability to secure a fair trial. *United States v. Anagnostou*, 974 F.2d 939, 942 (7th Cir.1992), cert. denied, 507 U.S. 1050, 113 S.Ct. 1943, 123 L.Ed.2d 649 (1993). It is not enough simply to speculate – as Aleman does here – that witnesses' memories might have faded because of the passage of time. In order to establish prejudice for due process purposes, a defendant's "allegations of prejudice must be specific, concrete and supported by the evidence – vague, speculative, or conclusory allegations will not suffice." *Canoy*, 38 F.3d at 902 (quotation omitted). Aleman claims without specific examples that the death of many key players in his alleged bribery and the substantial amount of time

between the events and his upcoming trial would hinder his ability to present a defense. This is nothing more than the kind of bald speculation that we have consistently rejected.

Aleman cannot establish the prejudice we require to proceed further with our due process inquiry. Even if he did, though, the State would have been able to show compelling justifications for the significant pre-indictment delay. Aleman takes the odd and untenable position of criticizing the State for not discovering his bribery of Judge Wilson sooner. Yet the crucial witness to that fact – Robert Cooley – was hidden in the Federal Witness Protection Program until he became available as a witness to the Cook County State's Attorney in 1993. *Cf. People v. Savickas*, 230 Ill.App.3d 322, 171 Ill.Dec. 713, 594 N.E.2d 1233, 1242 (rejecting a defendant's Confrontation Clause challenge to the admission of Cooley's testimony despite the fact that Cooley's protective custody prevented the State from producing him as a witness at trial), *review denied*, 146 Ill.2d 646, 176 Ill.Dec. 816, 602 N.E.2d 470 (1992). Aleman was reindicted for the Logan murder soon after Cooley became available. On the Reitinger charge, federal prosecutors originally included the murder as a predicate offense in Aleman's 1990 RICO prosecution, but they did not have enough evidence on which to base a separate criminal charge for the offense; this predicate offense was eventually struck from Aleman's plea agreement. State prosecutors likewise recognized the weakness of charging Aleman with Reitinger's murder until federal officials made Vincent Rizza available from the Federal Witness Protection Program in 1993. In short, even if

Aleman had sufficiently proven prejudice, his due process claim would have failed because the State did not intentionally delay prosecution in order to gain a tactical advantage. We affirm the district court's denial of the due process component of Aleman's petition.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's denial of Aleman's petition for a writ of habeas corpus.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. HARRY ALEMAN, Inmate # 03792-164 P.O. Box 34550 Memphis TN 38138-0550 Petitioner, v. THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION, ILLINOIS, HONORABLE MICHAEL P. TOOMIN, Judge Presiding, HONORABLE JAMES RYAN, Attorney General of Illinois, and RICHARD DEVINE, State's Attorney of Cook County, Illinois, Respondents.	No. 97 C 1514 Judge Suzanne B. Conlon

MEMORANDUM OPINION AND ORDER

Harry Aleman ("Aleman") petitions for habeas corpus pursuant to 28 U.S.C. § 2254, moves to stay criminal proceedings in the Circuit Court of Cook County pursuant to 28 U.S.C. § 2251, and moves to quash the execution of the State's writ of habeas corpus *ad prosequendum*. Aleman claims his imminent state court prosecution would violate his constitutional rights, including his rights under the Double Jeopardy Clause of the United States Constitution.

BACKGROUND

On September 27, 1972, Billy Logan ("Logan") was shot to death. In December 1976, Aleman was indicted for Logan's murder. Following a bench trial in May 1977 before Judge Frank Wilson, Aleman was acquitted. In October 1975, Anthony Reitinger ("Reitinger") was shot to death. A grand jury of the Circuit Court of Cook County ("the circuit court") indicted Aleman for the Reitinger and Logan murders in December 1993.

Aleman moved to dismiss the indictments, arguing that the prosecutions are unlawful on double jeopardy, speedy trial, and estoppel grounds. The State responded that double jeopardy does not apply to Aleman's 1977 trial because Judge Wilson received a $10,000 bribe to acquit Aleman.

The circuit court issued an interim ruling in October 1994, denying dismissal of the indictments provided the State could prove the 1977 bribery. *People v. Aleman*, 93 CR 28786, 1994 WL 684499 (Ill. Cir. Ct., Oct. 12, 1994). A final order was stayed pending the results of an evidentiary hearing on the alleged bribery. On October 19, 1994, the circuit court denied Aleman's motion to make the interim ruling final.

On February 9, 1995, the circuit court conducted an evidentiary hearing over Aleman's objection. On March 9, 1995, the court entered a final ruling, finding beyond a reasonable doubt that Judge Wilson was bribed during the 1977 trial. Accordingly, Aleman's motion to dismiss the indictments was denied.

Aleman appealed the circuit court decision. On June 18, 1996, an Illinois appellate court affirmed the circuit court, holding that: (1) the circuit court had jurisdiction to conduct an evidentiary hearing on the judicial bribe, and (2) the 1977 acquittal procured by bribery did not place Aleman in jeopardy. *People v. Aleman* (*Aleman I*), 667 N.E.2d 615 (Ill. App. Ct. 1996). The court also issued a Rule 23 order in support of its decision. On October 2, 1996, the Illinois Supreme Court denied Aleman's petition for leave to appeal. *People v. Aleman* (*Aleman II*), 671 N.E.2d 734 (Ill. 1996). The United States Supreme Court denied Aleman's petition for a writ of *certiorari* on February 18, 1997. *Aleman v. Illinois*, 117 S. Ct. 986 (1997). Aleman filed this petition for habeas corpus on March 6, 1997, as well as motions to stay state court proceedings and to quash the execution of the State's writ of habeas corpus *ad prosequendum* on March 27, 1997.

DISCUSSION

I. EXHAUSTION OF REMEDIE8 AND PROCEDURAL DEFAULT

Aleman must clear two procedural hurdles before the court may reach the merits of his habeas corpus petition: exhaustion of remedies and procedural default. *Rodriguez v. Peters*, 63 F.3d 546, 555 (7th Cir. 1995) (citations omitted). A habeas corpus petitioner exhausts all state remedies when (1) he presents his claims to the highest state court for a ruling on the merits, *Farrell v. Lane*, 939 F.2d 409, 410 (7th Cir. 1991), *cert. denied sub nom., Farrell v. McGinnis*, 502 U.S. 944 (1991), or (2) no state remedies remain available to the petitioner at the time his federal

habeas petition is filed. *Id.* (citing *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982)). Procedural default may occur in one of two ways. First, the petitioner may fail to raise fairly and properly an issue on direct appeal or post-conviction review. *Rodriguez*, 63 F.3d at 555 (citations omitted). Alternatively, the state court may rely on a state procedural bar as an independent basis for its disposition of the case. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). The parties agree Aleman exhausted his state court remedies and did not procedurally default his claims.

II. RIGHT TO INTERLOCUTORY REVIEW

Instead of relying on procedural default and exhaustion of remedies, the State contends the court should not consider the merits of Aleman's petition because: (1) the *Younger* abstention doctrine applies, and (2) Aleman has waived his right to a petition. Neither argument is persuasive.

A. YOUNGER ABSTENTION

In *Younger v. Harris*, 401 U.S. 37 (1971), the United States Supreme Court held that equity and federalism concerns require the federal courts to abstain from enjoining state court criminal prosecutions. In *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 302-3 (1984) (citing *Abney v. United States*, 431 U.S. 651 (1977)), the Court carved out an exception to this general rule in the particular case of double jeopardy challenges. The Court noted that double jeopardy rights "cannot be fully vindicated on appeal following final judgment, since in part the

Double Jeopardy Clause protects 'against being twice put to trial for the same offense.' " *Id.* at 303 (quoting *Abney*, 431 U.S. at 661). Accordingly, the Court held that the district court had properly exercised jurisdiction over a habeas corpus petition alleging a violation of the Double Jeopardy Clause, even though the State had not completed its prosecution of the defendant in state court. *Id.*

The State urges this court to create an exception to the double jeopardy exception described in *Lydon*. The State argues that equitable considerations weigh in favor of abstention in this case because the bribery of Judge Wilson leaves Aleman with unclean hands. In support of its position, the State cites *United States ex rel. Stevens v. Circuit Court of Milwaukee County*, 675 F.2d 946 (7th Cir. 1982) and *Reimnitz v. State's Attorney of Cook County*, 761 F.2d 405 (7th Cir. 1985).

In *Stevens*, the defendant was convicted as a result of a plea bargain. Stevens subsequently faced additional charges and claimed the Double Jeopardy Clause prohibited the later prosecution. The state court rejected his arguments, and Stevens sought federal court review. The Seventh Circuit held that *Younger* abstention applied because Stevens had not actually been tried; he had merely pled guilty. The court noted that the purpose of providing relief through an interlocutory habeas corpus petition is to prevent a criminal defendant from suffering the hardship of a second trial. The court concluded that since Stevens had not yet experienced a first trial, equitable considerations weighed against interlocutory habeas corpus review of his double jeopardy claim. *Stevens*, 675 F.2d at 948-49.

The Seventh Circuit's decision in *Stevens* is not applicable here for two reasons. First, *Stevens* was decided before *Lydon*, and *Lydon* does not suggest an exception of the type described in *Stevens*. The Court weighed the relevant equitable considerations in this type of case and found that abstention is not warranted. The Court concluded that when a criminal defendant is acquitted and then faces another prosecution on the same charge, equitable considerations weigh in favor of a federal habeas court hearing an interlocutory double jeopardy challenge. *Lydon*, 466 U.S. at 302-03.

Second, *Stevens* is distinguishable in that Aleman did not plead guilty; he was actually tried. The State suggests Aleman did not *really* suffer through a trial because he bribed the judge. However, the "reality" of Aleman's trial is the very issue raised by Aleman's habeas corpus petition. To decide whether Aleman's first trial was "real," the court would necessarily have to examine the merits, not merely the jurisdictional basis of Aleman's petition. Finally, *Reimnitz* is not helpful to the State because the Seventh Circuit actually considered the merits of the defendant's habeas corpus petition in that case. *Reimnitz*, 761 F.2d at 410. In short, the *Younger* abstention doctrine does not apply here.

2. WAIVER

The State contends Aleman has waived his right to habeas corpus review because he bribed the judge who acquitted him. The State argues that federal courts may decline to exercise jurisdiction in exceptional circumstances where denying a federal forum would serve an

important countervailing interest. *See, e.g., Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813-14 (1976). The State asserts Illinois has a strong public interest in the integrity of its judicial proceedings because of the particular circumstances of this case.

The State has not adequately explained why Illinois has a greater interest in this case than in other cases where a criminal defendant seeks interlocutory habeas corpus review on double jeopardy grounds. Judicial bribery is a serious offense, but that offense does not render the State's interest in its own double jeopardy proceedings more compelling than in situations involving other serious criminal conduct.

The State cites *United States v. Thevis,* 665 F.2d 616 (5th Cir. 1982). In *Thevis,* the Fifth Circuit made the common sense observation that a criminal defendant waives his right to confront a witness when the defendant is responsible for murdering that witness. *Id.* at 630. However, the Fifth Circuit did not hold that the defendant had waived his right to have his claim heard on the merits. Rather, the court held that the right to confrontation, not the right to have the claim heard, had been waived. In the same way, Aleman's petition for habeas corpus raises the question of whether he has waived his double jeopardy rights by bribing the judge who acquitted him. This question, like the Sixth Amendment question in *Thevis,* is not jurisdictional; it is inextricably linked to the merits of Aleman's petition. Thus, this basis for ignoring the merits of Aleman's habeas corpus petition is unpersuasive.

III. STANDARD OF REVIEW

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act, which amended the standard of review applied to federal habeas corpus petitions from state courts. 28 U.S.C. § 2254. Under the new version of section 2254, Aleman must show either that: (1) the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" 28 U.S.C. 2254(d)(1), or (2) the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d)(2).

IV. DOUBLE JEOPARDY

Aleman challenges both the Logan and Reitinger indictments on double jeopardy grounds. However, his arguments are ultimately without merit.[1]

A. THE LOGAN PROSECUTION

Aleman attacks both the legal and factual basis of the circuit court's double jeopardy analysis. With respect to the facts, Aleman makes two claims. First, he contends the circuit court made an unreasonable determination of the facts in light of the evidence presented when it found that Judge Wilson accepted a bribe. 28 U.S.C. § 2254(d)(2). Second, Aleman asserts that no state court has explicitly

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[1] The court notes Aleman's habeas corpus petition is unpersuasive under the old version of the statute as well.

found Judge Wilson's factual findings regarding Aleman's innocence to be erroneous.

With respect to the circuit court's finding that Judge Wilson accepted a bribe, Aleman must show by clear and convincing evidence that the circuit court's factual findings are erroneous. 28 U.S.C. § 2254(e)(1). At most, Aleman points to some statements by witnesses suggesting Judge Wilson was not bribed. However, Aleman's evidence falls far short of showing by clear and convincing evidence that Judge Wilson did not accept a bribe.

Next, Aleman asserts the Illinois courts have never explicitly found Judge Wilson's factual findings regarding Aleman's innocence to be erroneous. This begs the issue because the State had no right to appeal a finding of not guilty. *See, e.g., F.W. Standefer v. United States*, 447 U.S. 10, 22 (1980) (citing *United States v. Ball*, 163 U.S. 662, 671 (1896)). Moreover, Judge Wilson's findings relied heavily on subjective credibility determinations. It would be impossible to determine whether Judge Wilson's findings were actually erroneous. Accordingly, the lack of an explicit state court determination regarding Judge Wilson's factual findings is irrelevant.

Aleman argues that even if he bribed Judge Wilson, the Double Jeopardy Clause still protects Aleman from prosecution as a matter of constitutional law. Aleman contends an acquittal is an acquittal and that bribery should not affect the analysis of a double jeopardy claim. This is an issue of first impression. Neither party cites any state or federal decision previously addressing this particular question.

Aleman points to broad language in several United States Supreme Court opinions that appears to support his position. In *Arizona v. Washington*, 434 U.S. 497, 503 (1978)), the Court held that "[t]he constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal . . . " The Court noted that "the public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal [is] based upon an egregiously erroneous foundation.' " *Id.* (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)). The Court observed that "[i]f the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Id.*

Similarly, in *McCleskey v. Kemp*, 481 U.S. 279, 312 n.33 (1987) (quoting Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 7-8 (1966)), the Court declared that despite the apparent injustice that an erroneous acquittal might have, "[t]he founding fathers, in light of history, decided that the balance here should be struck in favor of the individual." In *Kepner v. United States*, 195 U.S. 100, 128 (1904), Justice Holmes explained that "a judgment in [defendant's] favor is final and conclusive. . . . " In *Green v. United States*, 355 U.S. 184, 192 (1957) (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)), the Court held that a "verdict of acquittal [is] final and [cannot] be reviewed, on error or otherwise, without putting [the] defendant twice in jeopardy. . . . " Finally, in *United States v. Jorn*, 400 U.S. 470 (1971), the Court found a double jeopardy violation when the prosecutor sought to reprosecute a

defendant who was erroneously granted a mistrial. Aleman argues that these cases, taken together, establish that an acquittal is not reviewable even when a judge's mistake or misconduct is the cause of the acquittal.

The Illinois courts found Aleman's interpretation of this line of cases to be unpersuasive. The Illinois courts applied United States Supreme Court precedent reasonably in arriving at this conclusion and their rulings are correct as a matter of constitutional law. In the course of an exhaustive and thorough discussion of double jeopardy law, the Illinois courts identified two reasons for finding the Double Jeopardy Clause inapplicable in Aleman's case. First, an essential component of jeopardy is risk of conviction. *Aleman II*, 667 N.E.2d at 624; *Aleman I*, 1994 WL 684499, at *10. The Illinois appellate court explained that "[j]eopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution." *Aleman II*, 667 N.E.2d at 624 (quoting *Breed v. Jones*, 421 U.S. 519, 528 (1975)). The court also pointed out that a "court may not apply rigid or mechanical rules in interpreting the [D]ouble [J]eopardy [C]lause." *Id.* (citing *Serfass v. United States*, 420 U.S. 377, 392 (1975)). Based on this authority, the Illinois appellate court examined the circumstances behind Aleman's acquittal. It found that because of bribery, Aleman did not face the risk of conviction normally associated with a criminal prosecution. Thus, the court concluded that Aleman's 1977 acquittal did not place him in jeopardy. *Id.* at 626.

The Illinois appellate court correctly concluded that Aleman dramatically reduced the risk of a conviction by bribing the trial judge. While Aleman did not completely

eliminate the risk of conviction, *see, e.g.*, David S. Rudstein, *Double Jeopardy and the Fraudulently Obtained Acquittal*, 60 Mo. L. Rev. 607, 639-40 (1995), Aleman dramatically and illegally altered the playing field on which the decision would be made. It is sufficient that "Aleman clearly was not subject to the risk normally associated with a criminal prosecution." *Aleman II*, 667 N.E.2d at 626. For that reason alone, jeopardy did not attach in Aleman's 1977 trial.

The Illinois appellate court noted an additional reason that jeopardy did not attach in this case. Namely, Judge Wilson not only corruptly decided Aleman's case; the trial itself was a sham. *Id.* at 624-25. This is not a case where a judge or jury made a mistake of law or fact. Aleman and Judge Wilson manipulated the proceedings in such a way as to make the trial a nullity. Thus, the 1977 acquittal should not be accorded constitutional significance. *See, e.g., People v. Deems*, 410 N.E.2d 8 (Ill. 1980).

Aleman responds that the State has waived its right to challenge his acquittal. Aleman asserts the State should have known that something was wrong with Judge Wilson's handling of the case not long after the acquittal, if not at the time of trial. In support of his position, Aleman points to his own unusual procedural maneuvering in getting Judge Wilson to preside over his case. However, Aleman does not adequately explain why the State should be punished for failing to question the motives of Aleman's attorneys. Aleman's waiver argument is without merit. Accordingly, Aleman cannot use the Double Jeopardy Clause as a basis for avoiding reprosecution of the Logan murder.

This Court cautions that its ruling is narrowly based on extraordinary facts. If the State can show beyond a reasonable doubt that a criminal defendant participated in the bribing of a judge to gain his own acquittal at a bench trial, the defendant may not use the Double Jeopardy Clause as a bar to a subsequent prosecution. *Cf. Bracy v. Gramley*, 81 F.3d 684, 689 (7th Cir. 1996), *cert. granted in part*, 117 S. Ct. 726 (1997) (suggesting in dicta that the Double Jeopardy Clause does not bar the reprosecution of a defendant who has bribed a judge and been acquitted) (citing *Benard v. State*, 481 S.W.2d 427, 430 (Tex. Crim. App. 1972) (the same)); *see also*, Anne Bowen Poulin, *Double Jeopardy and Judicial Accountability: When is an Acquittal not an Acquittal?*, 27 Ariz. St. L.J. 953 (1995); 22 Corpus Juris Secundum, "Criminal Law" Sec. 217. The Double Jeopardy Clause provides a fundamental protection in our system of justice. Exceptions must be extremely rare and must always be crafted with the utmost care and precision. The particular facts of this case provide one of those unusual occasions where double jeopardy protection is not implicated.

B. THE REITINGER PROSECUTION

Aleman was never tried for Reitinger's murder. Rather, Aleman contends the federal government's offer to prove his complicity in Reitinger's murder during Aleman's 1977 sentencing for federal racketeering bars the State from prosecuting Aleman for the murder. Aleman further claims his 1990 guilty plea in another federal racketeering case precludes the State from prosecuting him for the murder.

The Illinois appellate court correctly found these arguments unpersuasive for two reasons. First, the court noted "[a] federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one." *Aleman II*, 667 N.E.2d at 626 (quoting *United States v. Wheeler*, 435 U.S. 313, 317 (1978)). The racketeering prosecutions Aleman relies on both occurred in federal court. Thus, the State is not barred from prosecuting Aleman in state court.

Moreover, with respect to the 1977 sentencing, the federal prosecutor petitioned the court to sentence Aleman as a "special offender" pursuant to 18 U.S.C. § 3575, arguing that Aleman participated in Reitinger's murder. The federal trial court refused and sentenced Aleman only on the charges presented. Thus, as the Illinois appellate court properly noted, Aleman was not charged with or sentenced on the Reitinger murder in 1977. *Aleman II*, 667 N.E.2d at 626-27. With respect to the 1990 racketeering case, the Illinois appellate court correctly found that jeopardy did not attach because Aleman's plea agreement explicitly denied any involvement in the Reitinger murder. *Id.* at 627. Accordingly, Aleman may be prosecuted in state court for the Reitinger murder.

V. JUDICIAL ESTOPPEL

Aleman contends the State is judicially estopped from arguing that bribery of a judge requires a new trial. Judicial estoppel applies where: "(1) the later position is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; and (3) the party to be

estopped convinced the first court to adopt its position." *Capsopoulos v. Chater*, 95 C 3274, 1996 WL 717456, at *2 (N.D. Ill. Dec. 9, 1996) (citing *Levinson v. United States*, 969 F.2d 260, 264 (7th Cir. 1992), *cert. denied*, 506 U.S. 989 (1992)).

Aleman points to two cases where the State has argued that a defendant is not entitled to a new trial where a judge has accepted bribes. In *Bracy v. Gramley*, 81 F.3d 684 (7th Cir. 1996), *cert. granted in part*, 117 S. Ct. 726 (1997), the State argued that a defendant who did not bribe a judge was not entitled to a new trial simply because the judge had accepted bribes in *other* cases. In *Bracy*, the State did not argue that a defendant who bribes a judge cannot be tried again. Rather, the State argued that if a defendant did *not* bribe a judge, the defendant is not entitled to a new trial even if that same judge accepted bribes in other cases. The two positions are not analogous, let alone clearly inconsistent.

The State's position in *People v. Hawkins and Fields*, 85 C 7651; 85 C 6555, is also distinguishable from the position taken in this case. In *Hawkins and Fields*, the State argued that Hawkins, who bribed the trial judge but was nonetheless convicted after the judge returned the bribe money, is not entitled to a new trial. The State's position in that case is no different than the position taken here. Namely, the State argues that a defendant should not benefit from his own misdeeds. Moreover, the cases are factually distinguishable in that Hawkins and Fields were actually convicted. Accordingly, Aleman's judicial estoppel argument is without merit.

VI. SPEEDY TRIAL

Aleman contends the State's delay in commencing the Logan and Reitinger murder prosecutions resulted in a violation of Aleman's Fifth and Sixth Amendment rights to due process and a speedy trial. Aleman's arguments are unpersuasive.

The Sixth Amendment right to a speedy trial reflects a concern for lengthy incarcerations that result in anxiety and limit a defendant's ability to mount a defense. *United States v. Ewell*, 383 U.S. 116, 120 (1966). These concerns are not implicated until a defendant is arrested or formally charged. *United States v. Marion*, 404 U.S. 307, 315 (1971). In this case, Aleman's prosecution for the Reitinger murder began shortly after he was formally charged with the offense in 1993. Similarly, after his 1977 acquittal, Aleman was neither in custody nor charged with the Logan murder until the present prosecution. Thus, the state court correctly concluded that Aleman has not made out a Sixth Amendment speedy trial violation. *Aleman I*, 1994 WL 684499, at *18.

Aleman's Fifth Amendment due process claim fares no better. The Due Process Clause protects against oppressive pre-indictment delay. *United States v. Lovasco*, 431 U.S. 783, 789 (1977); *Marion*, 404 U.S. at 324. To prove a constitutional violation, Aleman must first show actual and substantial prejudice resulting from the delay. *United States v. Canoy*, 38 F.3d 893, 902 (7th Cir. 1994). If Aleman satisfies this burden, the State must show the reasonableness of the delay. *Id.* The court then balances the State's

reasons for delay against the prejudice suffered by Aleman in determining whether Aleman has been denied due process. *Id.*

The mere assertion of an inability to recall the events in question and a resulting difficulty in preparing for trial is not sufficient to establish actual and substantial prejudice. *Id.* Aleman has not provided any specific evidence of prejudice. Thus, Aleman's position is without merit for this reason alone.

Moreover, the State provides ample reason for the delay in prosecuting Aleman for the Logan and Reitinger murders. With respect to the Logan murder, part of the delay is attributable to Aleman's own actions. Namely, the State did not become aware of Aleman's bribery of Judge Wilson until long after Aleman's acquittal in 1977. In addition, the witnesses who could confirm the bribery did not become available to the State until 1993, which is when the State began its reprosecution of Aleman. Aleman asserts that one of the State's witnesses testified on behalf of the State in 1990. However, Aleman fails to refute the State's assertion (and the Illinois courts' finding) that both witnesses were not available to testify in this particular case until 1993. The Illinois courts correctly concluded that the State's delay in prosecuting Aleman for the Logan murder was not unreasonable in light of the previous unavailability of the witnesses who could prove Aleman bribed Judge Wilson.

With respect to the Reitinger murder, the State did not have enough evidence to indict Aleman until Vince Rizza became available as a witness in 1993. While Reitinger's murder was a predicate offense in Aleman's 1990

federal racketeering prosecution, the federal prosecutor apparently recognized the weakness of this charge at the time; the charge was excluded from Aleman's plea agreement.

Aleman responds by combining his Fifth Amendment due process and Sixth Amendment speedy trial claims. He argues that the pre-indictment delay here is *per se* unconstitutional in the same way a similar post-arrest or post-charge delay would be unconstitutional. No court has recognized the constitutional interpretation Aleman suggests. Thus, the Illinois courts correctly rejected Aleman's argument. In short, the State has not violated Aleman's Fifth or Sixth Amendment rights by seeking a prosecution in the Reitinger and Logan murders after a lengthy delay.

VII. FAILURE TO IMMUNIZE WITNESS

Finally, Aleman contends the evidentiary hearing as to the bribery of Judge Wilson violated his due process rights because John Doe, the only living occurrence witness other than Aleman, was denied immunity. Aleman claims John Doe's testimony would have been entirely exculpatory.

The central problem with Aleman's argument is that John Doe sought immunity from a pending federal prosecution. The State of Illinois has no authority to grant immunity from a federal prosecution. *See generally, Abbate v. United States,* 359 U.S. 187 (1959). Moreover, the State did not threaten to prosecute John Doe for a state offense or use any other similar tactic to prevent John Doe from testifying. Thus, *United States v. Herrera-Medina,* 853 F.2d

564 (7th Cir. 1988), is inapplicable. In short, Aleman's due process rights were not violated by the State's failure to afford John Doe immunity.

CONCLUSION

Harry Aleman's petition for habeas corpus is denied. Aleman's motion to stay Circuit Court criminal proceedings and to quash the execution of the State's writ of habeas corpus *ad prosequendum* is moot.

ENTER:

/s/ Suzanne B. Conlon
Suzanne B. Conlon
United States District Judge

May 5, 1997

APPENDIX F

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee, v. HARRY ALEMAN,
Defendant-Appellant.

1-95-1282

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT,
SECOND DIVISION

281 Ill. App. 3d 991; 667 N.E.2d 615; 1996 Ill. App.
LEXIS 450; 217 Ill. Dec. 526

June 18, 1996, Decided

PRIOR HISTORY:

Appeal from the Circuit Court of Cook County. Honorable Michael P. Toomin, Judge Presiding.

DISPOSITION: Affirmed.

JUDGES: PRESIDING JUSTICE HARTMAN delivered the opinion of the court: SCARIANO and BURKE, JJ., concur.

OPINION BY: HARTMAN

OPINION:

PRESIDING JUSTICE HARTMAN delivered the opinion of the court:

Defendant Harry Aleman appeals the circuit court's order denying his motion to dismiss two murder indictments against him. The procedural history of these indictments is unusual and requires extensive recountal for fuller understanding of the issues presented in this appeal.

On September 27, 1972, Billy Logan was shot to death on West Walton Street in Chicago, for which Aleman was

indicted in December 1976. Following a bench trial in May of 1977, he was acquitted. In October of 1975, Anthony Reitinger was shot to death near Taylor Street in Chicago. A grand jury indicted Aleman for both murders in December 1993, over 15 years later.

Aleman moved to dismiss the indictments based upon considerations of double jeopardy, speedy trial and estoppel. The State countered that Aleman's 1977 trial was a nullity by virtue of a $10,000 judicial bribe to acquit him; therefore, double jeopardy is inapplicable.

The circuit court issued an "interim ruling" in October 1994, denying dismissal of the indictments and finding no legal impediment to trial, provided the State could prove the 1977 bribery. Entry of a final order was stayed until an evidentiary hearing could be held with respect to that alleged bribery. Aleman's motion to make the interim ruling final was denied on October 19, 1994.

Supreme Court Rule 604(f) interlocutory review sought by Aleman on October 26, 1994, was dismissed by this court. The Illinois Supreme Court denied Aleman's motion for a Supreme Court Rule 383 supervisory order on January 6, 1995.

The circuit court evidentiary hearing proceeded on February 9, 1995, over Aleman's objection. On March 9, 1995, the court entered a supplemental and final ruling, finding sufficient evidence to establish that Judge Frank Wilson had been bribed during the 1977 trial and denied Aleman's motion to dismiss the indictments.

The issues raised in this appeal include whether the circuit court (1) possessed jurisdiction to conduct the 1995

evidentiary hearing; (2) erred in denying Aleman's motion to dismiss the indictments by reason of double jeopardy; (3) erred in conducting the evidentiary hearing; (4) improperly ordered the indictments to stand in violation of his right to a "speedy prosecution" and speedy trial under the Illinois and United States Constitutions; (5) erred in finding that he was an active participant in the bribery scheme; and (6) improperly refused to immunize a proposed defense witness. Issues (1) and (2) will be considered in this opinion; issues (3) through (6) will be determined in a separate Supreme Court Rule 23 order disseminated contemporaneously.

Evidence adduced at the 1995 evidentiary hearing would permit a fact finder to believe the following. After Aleman was indicted in December 1976, his case was placed on the trial call of Cook County Circuit Judge James Bailey. His then attorney, Thomas J. Maloney, petitioned to substitute judges, naming Judges Bailey and Wilson, asserting that Aleman would not receive a fair trial before either of them. His motion was granted; the cause was transferred and reassigned to Judge Fred Suria. On March 8, 1977, Judge Suria recused himself from the case.

Aleman's cause was then assigned to Judge Wilson, who on March 22, 1977, granted his motion to withdraw Wilson's name from the earlier petition for substitution of judges. Maloney's motion to withdraw as Aleman's counsel was granted and Frank Whalen filed his written appearance as defense counsel on April 3, 1977.

Vincent Rizza, a former Chicago police officer, testified that during the end of 1974 and the beginning of

1975, while still an officer, one of his bookmaking operations was raided by the police. Rizza met Aleman, Jimmy Inendino and Johnnie Mancella in the spring or summer of 1975, and was told by Aleman that he owed $40,000 in back "street taxes," plus $1,000 per month thereafter for his bookmaking operation. "Street taxes" are monies paid to members of organized crime in order to protect the existence of the illegal operation.

Following Aleman's intrusion into Rizza's illicit business, Rizza met with Angelo LaPietra who, according to Rizza, also had ties to organized crime. LaPietra's negotiations permitted Rizza to pay Aleman $1,000 in street taxes plus a couple of hundred dollars per month for office expenses. Aleman and Inendino would cover all operation losses and the profits would be split. As part of the deal, Rizza also had to report other independent bookmakers to Aleman. One such independent bookmaker was Anthony Reitinger.

Rizza did not pay street taxes directly to Aleman after May of 1976, but continued to pay them to Joseph Ferriola, identified as Aleman's uncle. In the early winter of 1977, Aleman told Rizza that his murder indictment "was all taken care of," and that "committing murder in Chicago was okay if you killed the right people." He later told Rizza that he was going to request a bench trial "because the case was all taken care of"; going to jail was not an option; and he was not going to jail. Still later, Aleman told Rizza the case was going "fine." Rizza noted that the newspapers were crucifying him and the case looked bad. Aleman responded that the case was "taken care of."

On cross-examination, Rizza admitted that he had used cocaine frequently during the late 1970s and that he had committed perjury as a Chicago police officer and in his federal criminal drug case. Rizza stated that he had been in the Federal Witness Protection Program during the 1980s.

The parties then stipulated that pursuant to a 1990 federal prosecution, Aleman pled guilty to engaging in illegal activities with "the Ferriola street crew" which was controlled by "the Outfit," an organized criminal group which collected wagers on sporting events and street taxes from independent bookmakers. He told attorney Robert Cooley to find independent bookmakers who were not paying street taxes and to place bets with them; if Cooley lost, Aleman would "grab" the bookmakers. Aleman's plea also admitted that Rizza operated a gambling business and paid $500 to $1,000 per month in street taxes to him and Inendino. He told Rizza to locate any independent bookmakers and tell them "Joe Nagel," Ferriola's nickname, had sent him. In the federal plea agreement, Aleman denied any participation in Reitinger's murder or Judge Wilson's bribery. He was sentenced to 12 years in prison.

Cooley, a former Chicago police officer and an attorney associated with the law firm of Cooley, DeLeo, and D'Arco, testified that during the time he practiced criminal law, he frequently bribed judges, prosecutors, clerks and sheriffs. In 1986, Cooley began working for the United States Attorney's office as an undercover informant.

In February 1977, Cooley met 1st Ward figures Pat Marcy and John D'Arco, Sr. Marcy asked Cooley if he "had a judge at 26th Street who could handle or take care of a case," one who would fix Aleman's case. Cooley knew of Aleman's reputation as the main enforcer for the mob in Chicago.

When Cooley ran into Judge Wilson, a close friend, he told Wilson of the approach to "handle" Aleman's case. Wilson informed Cooley that he had been "SOJ'd" (substitution of judge) on the case. Cooley later told Wilson the case was weak, it could be handled very easily, and that Cooley would pay him $10,000 for an acquittal. After Cooley again met Wilson the latter agreed to handle the case if Maloney, Aleman's attorney, would withdraw because he and Maloney were friends. Cooley then gave $2,500 to Wilson, the remaining $7,500 to be paid when the trial was over.

After paying Wilson initially, Cooley met Marco D'Amico and Aleman. Cooley assured Aleman that the case had been fixed; the judge would acquit him. Cooley then met Frank Whalen in a loop hotel in April 1977. Cooley told Whalen that he knew what he was doing, the judge was going to throw the case out, and the judge did not want to have any contact with Whalen. Cooley would act as middleman. Whalen agreed.

Cooley met Aleman with Butch Petrocelli, Aleman's "partner on a lot of hits," present. Aleman informed Cooley that his brother, Anthony, contacted a female witness to the Logan murder, who would accept $10,000 to testify that he had not done the shooting. Cooley later informed Judge Wilson about this witness; Wilson

thought that was a good idea. Cooley did not inform Wilson of the $10,000 witness payment. Cooley then met Whalen in Florida a week before the trial and again assured him that Wilson would throw the case out.

On the second day of trial, Judge Wilson and Cooley met. Wilson was very upset and voiced his concern that the case was not as weak as Cooley had initially represented. The next day, Cooley told Marcy of this development. Marcy responded that Wilson had "better do what he's supposed to do."

Cooley met Wilson again. Wilson was even more upset this time because the prosecutors had informed him that a witness was receiving $10,000 for testifying falsely. Wilson was amazed that he was only receiving $10,000 although he was a "full circuit judge." Wilson explained that he may lose his job and asserted, "that's all I get is ten thousand dollars? I think I deserve more." Wilson blamed Cooley because he would receive "all kinds of heat" for this trial. He again requested more bribe money. Cooley told Wilson he would see what he could do. Wilson never expressed any intention not to fulfill his end of the deal. Cooley would pay Wilson the remaining $7,500 after the trial. Cooley met with Marcy again, who told him that Wilson "won't get a nickel more."

On May 24, 1977, Judge Wilson acquitted Aleman of Logan's murder. After the trial, Marcy gave Cooley two envelopes; one contained $7,500 for Wilson and the other held $3,000 for Cooley. That evening, Cooley and his secretary met Wilson at a restaurant. In the men's room, Cooley gave Wilson the $7,500. Wilson was upset because the press was "all over" him and complained, "That's all

I'm going to get? I don't get any more than that?" Wilson then left.

A few weeks later, Aleman told Cooley that he had done a great job and asked for some business cards so that he could send him more business.

On cross-examination, Cooley testified, among other things, that he is paid $3,400 per month by the government.

Aleman introduced an F.B.I. report prepared by Special Agent John Bowen on March 1, 1989, following an interview with Cooley. Bowen's report indicated that Cooley asked Marcy to remove Maloney from defendant's 1977 murder trial because Cooley did not like him. The report also indicated that Cooley had been given a $2,500 advance from Marcy to "lock him [Wilson] in on the case."

The parties stipulated that Cooley's secretary testified during a federal trial that she was with Cooley when he met Judge Wilson following Aleman's 1977 trial; Wilson looked very sad and said, "You look like a nice young girl. Stay away from [Cooley]."

Edward Whalen testified at the evidentiary hearing. He was Frank Whalen's nephew and often helped his uncle with cases, including Aleman's 1977 murder trial. His uncle never stayed at a loop hotel, as Cooley claimed. Edward never came into contact with Cooley during this time. Neither Frank Whalen nor Aleman ever indicated to Edward that the case had been predetermined. Edward never met Pat Marcy, John D'Arco, Sr., nor John D'Arco, Jr., and never saw Judge Wilson outside of the courtroom.

On cross-examination, Edward identified a transcript of an in camera proceeding of Aleman's murder trial regarding the defense motion in limine to bar certain testimony of a witness. The assistant State's Attorney there made an offer of proof that twice during the winter, Aleman's brother had offered a witness money to testify she saw someone other than him "get out of the hit car." In January, 1977, Aleman told the witness, "it would be worth $10,000" if the witness would testify that she saw someone other than defendant "get into the hit car." Following the in camera proceeding, Judge Wilson ruled that the testimony was inadmissible because "it would be very prejudicial, it's hearsay, obviously no basis." In a statement to the F.B.I. in 1990, that witness denied having seen any cars on the night Logan was murdered or being offered money in connection with her testimony.

The parties stipulated that F.B.I. agent Francis Marrocco would testify that he interviewed Judge Wilson at his home in Sun City, Arizona on November 30, 1989. Marrocco there informed Wilson that Cooley had been cooperating with the federal government and had recorded one of his recent conversations with Wilson. Marrocco also told Wilson that the government was investigating Logan's murder and Aleman's subsequent trial in which the government believed Wilson had accepted a bribe from Cooley for an acquittal. Wilson declined to hear the recorded conversation and denied having accepted $10,000 to acquit Aleman. Marrocco then served Wilson with a grand jury subpoena for a December 6, 1989, appearance in Chicago, but he failed to appear.

Judge Wilson's body was discovered in his backyard on February 5, 1990, having sustained a single gunshot wound to his head. The cause of death was listed as suicide.

The parties further stipulated that Monte Katz testified at the federal sentencing hearing of Maloney, after Maloney had been convicted of federal racketeering charges, among others, in unrelated cases. Katz and Aleman were both incarcerated at the Metropolitan Correction Center and later at a federal correctional institution in Oxford, Wisconsin. Katz and Aleman became friends at the federal institution and Aleman often discussed crimes he had committed, including the Logan murder. Aleman recently had been reindicted for the Logan murder but he was unconcerned. Aleman showed Katz an ABA Law Journal article regarding the instant proceedings, asked Katz for his opinion, and then said that he had the original trial "fixed" by having his uncle, Joe Nagel, pay Marcy money to "reach" the judge. Aleman "wasn't worried" about being indicted because the case was too old and would not be won because it "was a double jeopardy situation." Katz informed the Cook County State's Attorney's office of these conversations on April 19, 1994.

The defense introduced Aleman's sworn affidavit into evidence in which he denied: (1) meeting with Cooley in 1977 "in or out of the presence of someone named Marco D'Amico"; (2) speaking with Cooley in connection with the Logan murder trial; and (3) participating "in any bribery of any judge" regarding his 1977 acquittal in the Logan murder.

On March 9, 1995, the circuit court in the present case filed its supplemental ruling denying Aleman's motion to dismiss the indictments. The court initially ruled that Cooley's testimony was admitted properly under the co-conspirator's exception, overruling Aleman's motion to strike. The court further concluded that the State sufficiently met its burden of producing proof that Aleman had participated in bribing Judge Wilson during his 1977 trial for the Logan murder; therefore, Aleman's motion to dismiss the indictments was denied for want of previous jeopardy. This appeal followed.

I

Aleman initially contends that the circuit court proceedings were void because they were held prior to the issuance of the appellate mandate after his having filed a Supreme Court Rule 604(f) appeal, and thereafter sought Supreme Court Rule 383 relief, which stayed the appellate mandate under Supreme Court Rule 368(b).

A

Supreme Court Rule 604(f) provides, in part, as follows:

> "The defendant may appeal to the Appellate Court the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy."

134 Ill. 2d R. 604(f).

Although it is true that the proper filing of a notice of appeal divests the circuit court's jurisdiction and the jurisdiction of the appellate court attaches instanter

(*Daley v. Laurie, 106 Ill. 2d 33, 37, 476 N.E.2d 419, 86 Ill. Dec. 918 (1985)*), the substantive effect of an order controls its appealability. See *People v. Keith, 148 Ill. 2d 32, 39, 591 N.E.2d 449, 169 Ill. Dec. 276 (1992); People v. Rudi, 103 Ill. 2d 216, 224, 469 N.E.2d 580, 82 Ill. Dec. 936 (1984); People v. Bean, 135 Ill. App. 3d 336, 339, 481 N.E.2d 888, 90 Ill. Dec. 88 (1985).* More particularly, an order contemplating further proceedings is not final and, consequently, is not appealable. *People v. Heddins, 66 Ill. 2d 404, 406, 362 N.E.2d 1260, 6 Ill. Dec. 340 (1977).*

Aleman asserts that when he filed a Supreme Court Rule 604(f) notice of appeal, the circuit court was divested of its jurisdiction of the cause, relying upon *People v. Hiatt, 229 Ill. App. 3d 1094, 595 N.E.2d 733, 172 Ill. Dec. 372 (1992),* and *People v. Bean, 135 Ill. App. 3d 336, 481 N.E.2d 888, 90 Ill. Dec. 88 (1985).* Neither Hiatt nor Bean support Aleman's assertion because neither of the respective circuit courts in those cases entered orders contemplating further proceedings, unlike the instant case. *Hiatt, 229 Ill. App. 3d at 1095; Bean, 135 Ill. App. 3d at 341-42.* The defendants in Hiatt and Bean were permitted to appeal under Supreme Court Rule 604(f) because the circuit courts entered orders denying motions to dismiss. In the case sub judice, the court's interim ruling specifically contemplated further proceedings, concluding: "The entry of a final order on the motion to dismiss will be stayed pending resolution of the factual issues." The court's ruling cannot be any clearer: a final order on Aleman's motion to dismiss indictments would not be entered until the underlying factual dispute was resolved.

Aleman correctly maintains that the substantive effect of an order governs its appealability. See *People v. Rudi, 103 Ill. 2d 216, 224, 469 N.E. 2d 580, 82 Ill. Dec. 936 (1984)*. He asserts that the interim ruling here, coupled with his concession concerning the bribery, render that ruling a final, appealable order. The alleged bribery concession is claimed to have been made at argument on August 23, 1994. The record is to the contrary. The circuit court, upon agreement of the parties, proceeded first to legal contentions in order to determine whether the current indictments violated double jeopardy and speedy trial principles. If Aleman's legal arguments were valid, the court reasoned, it would not have to hold an evidentiary hearing because the indictments would be barred by law. Aleman's alleged "concession" essentially was a stipulation, in the form of a demurrer, to the State's proffered testimony. The August 23, 1994, proceeding was held, then, in order to address only the legal issues concerning defendant's motion to dismiss indictments.

This conclusion is buttressed by the circuit court's interim ruling which conditionally assumed, as did the August proceeding, the existence of the alleged bribery in order to address Aleman's legal arguments concerning double jeopardy. The court noted that its interim ruling was incomplete, however, for three reasons. First, the ruling was based upon the assumption that the State subsequently could prove the existence of the underlying bribery. Second, the record was insufficient because the court's interim ruling was "based not upon factual determinations, but rather upon what the facts are assumed to be, devoid of the contrary conclusions that might obtain were the assertions subjected to the legal machinery of

confrontation or rebutted by other relevant evidence." Third, the court observed, "should the reviewing court affirm the conclusions reached herein, and then remand the matter for further consideration, [this] court would then be required to make factual findings which could then be the subject of yet another appeal before the issue of double jeopardy was finally resolved." An evidentiary hearing was ordered also to ensure that the proffered evidence would not lose its availability.

The circuit court's interim ruling was based neither upon any concession by Aleman to the alleged bribery of Judge Wilson nor upon any facts concerning that bribery. The court's ruling was not a final order from which a proper notice of appeal could be filed, but a court order which contemplated further proceedings and, as such, barred the initiation of any appeal. See *People v. Heddins, 66 Ill. 2d 404, 406, 362 N.E.2d 1260, 6 Ill. Dec. 340 (1977).*

Aleman's notice of appeal was not proper at this stage of the proceedings and, therefore, the circuit court was never divested of its jurisdiction to hold the evidentiary hearing.

B

Aleman next asserts that the circuit court was without jurisdiction to conduct the evidentiary hearing because he sought supreme court relief under Supreme Court Rule 383, which is claimed to have stayed automatically the appellate mandate under Supreme Court Rule 368(b).

Supreme Court Rule 368(b) provides, in part, as follows:

> "In all other cases, the mandate is stayed automatically if, before it may issue, a party who is entitled to seek review by the Supreme Court- * * * files a petition in the Supreme Court for such review." (Emphasis added.) Official Reports Advance Sheet No. 26 (Dec. 22, 1993), R. 368, eff. Feb. 1, 1994.

The italicized language clearly demonstrates that Rule 368(b) applies only to parties who are entitled to seek review. Here, Aleman was not so entitled. His untimely efforts to obtain review did not ripen merely by having sought a supreme court supervisory order under Supreme Court Rule 383. 134 Ill. 2d R. 383. Significantly, supreme court refusal to grant supervisory relief requires no mandate to issue thereafter to any court. Aleman, himself, recognized the precipitate nature of his effort to appeal when he filed not only a motion in the circuit court, unsuccessfully, to have the interim order denoted final, but, in seeking supervisory review by the supreme court, he also filed a motion to stay the proceedings in the circuit court, which was denied on January 6, 1995. There would have been no need to stay proceedings already automatically stayed by operation of Supreme Court Rule 368(b), if his theory was correct.

Aleman was not entitled to seek review here or in the supreme court until the circuit court had actually denied his motion to dismiss and, therefore, the mandate of this court, if one was necessary, was not automatically stayed under Supreme Court Rule 368(b).

C

Aleman nevertheless claims that the circuit court did not have jurisdiction to hold the evidentiary hearing on February 9, 1995, because the appellate mandate, which ultimately was filed, was not issued until March 15, 1995. As previously shown, issuance of the mandate of March 15, 1995, was an unnecessary act and cannot now be construed to have deprived the circuit court of jurisdiction. The cases cited by Aleman involved timely and proper appeals in which the appellate court's jurisdiction had attached. See *People v. Palmer, 188 Ill. App. 3d 378, 381-82, 543 N.E.2d 1106, 135 Ill. Dec. 538 (1989); People v. Elsholtz, 136 Ill. App. 3d 209, 210-11, 483 N.E.2d 386, 91 Ill. Dec. 104 (1985); People v. McBride, 114 Ill. App. 3d 75, 78-81, 448 N.E.2d 551, 69 Ill. Dec. 833 (1983).* Unlike these cases, the court in the instant case did not make a final ruling on a pretrial motion and, therefore, until Aleman's motion to dismiss the indictments had been ruled upon fully, the notice of appeal was improper.

Further, Aleman fully participated in the evidentiary proceedings on February 9, 1995, notwithstanding the absence of a putative returned mandate. Although he claims to have objected to the proceedings, nothing about want of mandate was mentioned until March 21, 1995, long after the hearings commenced. If the return of a mandate had been required, Aleman waived its absence by participating in the hearing without waiting for or demanding this formality. See *Whitcanock v. Nelson, 81 Ill. App. 3d 186, 400 N.E.2d 998, 36 Ill. Dec. 418 (1980).* There was no error.

The circuit court had jurisdiction to conduct the evidentiary hearing.

II

Defendant next asserts that a blending of federal and state constitutional protections proscribes reprosecution for the same offense, urging this court to construe Illinois constitutional guarantees liberally in his favor.[1]

A

Aleman posits that Illinois authorities clearly have broadened the base of constitutional protections afforded by the United States Constitution, relying upon *People v. McCauley, 163 Ill. 2d 414, 645 N.E.2d 923, 206 Ill. Dec. 671 (1994), People v. Turnage, 162 Ill. 2d 299, 642 N.E.2d 1235, 205 Ill. Dec. 118 (1994), In re May 1991 Will County Grand Jury, 152 Ill. 2d 381, 604 N.E.2d 929, 178 Ill. Dec. 406 (1992),* and *People v. DiGuida, 152 Ill. 2d 104, 604 N.E.2d 336, 178 Ill. Dec. 80 (1992).* The foregoing cases involve expansions by the Illinois Supreme Court of clauses of the Illinois Constitution other than article I, section 10, which provides:

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[1] Although the Reitinger murder was not at issue in the evidentiary hearing, Aleman has consistently treated the two indictments as related. Specifically, he filed a single motion to dismiss both indictments and has appealed both indictments under the same appellate number. We shall accord this aspect of the appeal the same treatment.

> "No person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy for the same offense."

Ill. Const. 1970, art. I, § 10.

In *People v. Levin, 157 Ill. 2d 138, 160, 623 N.E.2d 317, 191 Ill. Dec. 72 (1993)*, our supreme court rejected the argument that the fifth amendment's double jeopardy clause was more restrictive than its Illinois counterpart. In *Levin*, the court noted that despite the difference in phraseology between the Illinois and federal double jeopardy provisions, "the difference in wording offers no substantial basis to support a conclusion that Illinois' clause provides broader protections than does its Federal counterpart." *157 Ill. 2d at 160.*

Aleman nevertheless insists that Illinois provides protections beyond those assured by the fifth amendment, relying upon *People v. Van Cleve, 89 Ill. 2d 298, 432 N.E.2d 837, 59 Ill. Dec. 893 (1982)*, and *People v. Pender, 154 Ill. App. 3d 978, 507 N.E.2d 951, 107 Ill. Dec. 798 (1987)*. In *Pender*, the court dismissed the State's appeal following a directed verdict for defendant. *154 Ill. App. 3d at 982.* Although *Pender* discussed double jeopardy, the court concluded that article VI, section 6 of the Illinois Constitution barred the State's appeal from an acquittal.[2] *154 Ill. App. 3d at 980.* The Pender court cited *People v. Van Cleve, 89 Ill. 2d 298, 432 N.E.2d 837, 59 Ill. Dec. 893 (1982)*, for the proposition that article VI, section 6 of the Illinois Constitution "provides rights and protections beyond those

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[2] Article VI, section 6 of the Illinois Constitution relates to the jurisdiction of appellate courts.

assured by the double jeopardy clause." *154 Ill. App. 3d at 980.* No Illinois case cited by Aleman concludes that article I, section 10 of the Illinois Constitution provides greater protection than the double jeopardy clause of the United States Constitution.[3] In fact, the most recent Illinois Supreme Court decisions are to the contrary. See *People v. Carrillo, 164 Ill. 2d 144, 147-48, 646 N.E.2d 582, 207 Ill. Dec. 16 (1995); People v. Levin, 157 Ill. 2d 138, 160, 623 N.E.2d 317, 191 Ill. Dec. 72 (1993).*

The Illinois double jeopardy provision affords no greater protection than the double jeopardy clause of the fifth amendment.

B

Aleman persists in his theory that his acquittal in the 1977 murder trial is an absolute bar to any further reprosecution, based upon fifth amendment considerations.

The fifth amendment to the United States Constitution provides, in part, as follows:

> "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

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[3] Aleman argues in his reply brief that former jeopardy has broader analytical overtones based upon the wording of Supreme Court Rule 604(f) and 720 ILCS 5/3-4(a)(1) (West 1992). Although Rule 604(f) states "former jeopardy" and the statute provides "former prosecution," case law has not bestowed upon Supreme Court Rule 604(f) any such special distinction. We also decline to do so.

> deprived of life, liberty, or property, without due process of law * * * ."

U.S. Const., amend. V.

No case has been cited by Aleman or the State involving the application of double jeopardy principles to circumstances presented here: the alleged bribery of a judge resulting in acquittal of a defendant who the State seeks to retry for the same offense. Accordingly, we treat this issue as one of first impression.

The protections against double jeopardy afforded by the fifth amendment are applicable to the states through the due process clause of the fourteenth amendment. *Benton v. Maryland, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969).* "[A] defendant once acquitted may not be subjected to trial without violating the Double Jeopardy Clause." *United States v. Scott, 437 U.S. 82, 96, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978).* Moreover, a public interest exists in the finality of criminal judgments and bars a reprosecution even when the acquittal is based upon an egregiously erroneous foundation. *United States v. DiFrancesco, 449 U.S. 117, 129, 66 L. Ed. 2d 328, 101 S. Ct. 426 (1980),* citing *Fong Foo v. United States, 369 U.S. 141, 143, 7 L. Ed. 2d 629, 82 S. Ct. 671 (1962).*

In *Green v. United States, 355 U.S. 184, 187-88, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957),* the United States Supreme Court, in discussing double jeopardy, stated:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual

> for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Of particular importance here is that "[j]eopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution." (Emphasis added.) *Breed v. Jones, 421 U.S. 519, 528, 44 L. Ed. 2d 346, 95 S. Ct. 1779 (1975).* The word "acquittal" invokes no talismanic protection; courts are dutybound to examine the substance of the claim. *Serfass v. United States, 420 U.S. 377, 392, 43 L. Ed. 2d 265, 95 S. Ct. 1055 (1975); People v. Rudi, 103 Ill. 2d 216, 223-24, 469 N.E.2d 580, 82 Ill. Dec. 936 (1984); People v. Deems, 81 Ill. 2d 384, 388, 410 N.E.2d 8, 43 Ill. Dec. 8 (1980); People v. Edwards, 97 Ill. App. 3d 407, 411-12, 422 N.E.2d 1117, 52 Ill. Dec. 908 (1981).* A court may not apply rigid or mechanical rules in interpreting the double jeopardy clause. *Serfass, 420 U.S. 377, 390, 43 L. Ed. 2d 265, 95 S. Ct. 1055,* citing *Illinois v. Somerville, 410 U.S. 458, 35 L. Ed. 2d 425, 93 S. Ct. 1066 (1973).* See Annotation, Earlier Prosecution for Offense During Which Homicide was Committed As a Bar to Prosecution for Homicide, *11 A.L.R.3d 834 (1967).*

Aleman's argument for dismissal of the instant indictments is based essentially upon double jeopardy's emphasis on finality, urging that "an acquittal is an acquittal," citing cases to establish this "absolute" constitutional hypothesis. Several cases do state broadly that a verdict of acquittal cannot be reviewed without putting a

defendant twice in jeopardy; however, none of them involve any fraud on behalf of defendants or the lower courts. See generally *People v. Porter, 156 Ill. 2d 218, 620 N.E.2d 381, 189 Ill. Dec. 413 (1993); People v. Creek, 94 Ill. 2d 526, 447 N.E.2d 330, 69 Ill. Dec. 113 (1983); People v. Borchers, 67 Ill. 2d 578, 367 N.E.2d 955, 10 Ill. Dec. 346 (1977); People v. Brown, 227 Ill. App. 3d 795, 592 N.E.2d 342, 169 Ill. Dec. 855 (1992).* The same is true of *People ex rel. Daley v. Crilly, 108 Ill. 2d 301, 483 N.E.2d 1236, 91 Ill. Dec. 601 (1985),* and *People v. Wiley, 71 Ill. App. 3d 641, 389 N.E.2d 1283, 27 Ill. Dec. 875 (1979),* on which Aleman also relies.

Fairness and finality to both parties are integral components of double jeopardy. See generally *Nelson v. Lockhart, 488 U.S. 33, 44-47, 102 L. Ed. 2d 265, 109 S. Ct. 285 (1988)* (Marshall, J., dissenting); *Burks v. United States, 437 U.S. 1, 15-16, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978); United States v. DiFrancesco, 449 U.S. 117, 129, 66 L. Ed. 2d 328, 101 S. Ct. 426 (1980).* The State also must be provided with at least "one fair opportunity to offer whatever proof" it can assemble. See *Burks, 437 U.S. at 16; Edwards, 97 Ill. App. 3d at 411-12.*

The protections afforded by double jeopardy are not as absolute and conclusive as Aleman suggests; exceptions are recognized and applied when appropriate. Two such exceptions are relevant to the present case: first, a sham trial, which results in an acquittal because the State does not submit evidence, cannot be considered jeopardy. *People v. Deems, 81 Ill. 2d 384, 410 N.E.2d 8, 43 Ill. Dec. 8 (1980).* In Deems, the circuit court denied the State's motion to dismiss and held trial. The State presented no evidence at trial and even admitted that defendant did

not commit the pending charge but sought to indict defendant for a different crime. *81 Ill. 2d at 387.* Although the circuit court acquitted defendant, the *Deems* court held that jeopardy had not attached to defendant's case although the trial ended in an "acquittal," because the proceeding bore none of those characteristics except the label. *81 Ill. 2d at 389.* The *Deems* court, therefore, found that the first "trial" was a sham because "defendant was at no time in danger of being found guilty of any offense." *81 Ill. 2d at 390; see Lockett v. Montemango, 784 F.2d 78 (2nd Cir. 1986); People v. Rudi, 103 Ill. 2d 216, 469 N.E.2d 580, 82 Ill. Dec. 936 (1984); People v. Verstat, 112 Ill. App. 3d 90, 444 N.E.2d 1374, 67 Ill. Dec. 691 (1983); People v. Edwards, 97 Ill. App. 3d 407, 422 N.E.2d 1117, 52 Ill. Dec. 908 (1981).*

The second relevant exception to the absolutism of double jeopardy is fraud or collusion. The circuit court's interim ruling in the case sub judice correctly noted that "a judgment of acquittal procured by a defendant through fraud is a nullity and does not put him in jeopardy."[4] That jeopardy cannot attach to proceedings infected with fraud or collusion is ineluctable. *Serfass v. United States, 420 U.S. 377, 43 L. Ed. 2d 265, 95 S. Ct. 1055 (1975); Lockett v. Montemango, 784 F.2d 78 (2nd Cir. 1986).* The *Serfass* court noted, in relation to dismissal of a criminal prosecution prior to trial, that a defendant must be

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[4] The circuit court's interim ruling articulated extraordinary analysis and depth of caselaw and treatises which recognize that an acquittal procured by fraud does not act as a bar to a subsequent prosecution.

" 'subjected to the hazards of trial and possible conviction.' " *420 U.S. at 391*, quoting *Green v. United States, 355 U.S. 184, 187, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957)*. Further, "the language of the cases in which we have held that there can be no appeal from, or further prosecution after, an 'acquittal' cannot be divorced from the procedural context in which the action so characterized was taken." *420 U.S. at 392*. To the same effect is *Lockett*, in which the State was permitted to reprosecute defendant because he was not subject to jeopardy in the first proceeding by virtue of his fraudulent representations to the court. *784 F.2d at 84*.

> Similarly, the common law supports the State's contention that a defendant who was acquitted due to fraud or collusion was never placed in jeopardy and, therefore, could be reprosecuted. Fraudulent actions by defendants have been recognized historically as exceptions to the constitutional protections afforded by double jeopardy principles.[5] See *State v. Brown, 16 Conn. 54 (1843); State v. Jones, 7 Ga. 422 (1849); State v. Bell, 81 N.C. 551 (1879); State v. Howell, 220 S.C. 178, 66 S.E.2d 701 (1951); State v. Johnson, 248 S.C. 153, 149 S.E.2d 348 (1966)*. This principle has been applied in other contexts.

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[5] The State correctly maintains that the fraud in the instant case is unlike perjury. A perjurer is subject to cross-examination and impeachment; fraud is far more pernicious because the outcome is predetermined, regardless of the evidence presented at trial. The State argues, further, that the bribe in the case sub judice renders the verdict void. *People v. Drysch, 311 Ill. 342, 348-49, 143 N.E. 100 (1924)*. In Drysch, the supreme court noted that a court is authorized to vacate a judgment which has been obtained through fraud. *311 Ill. at 348-49*.

Goene v. State, 577 So. 2d 1306 (Fla. 1991); State v. Burton, 314 So. 2d 136 (Fla. 1975); State v. Nardone, 114 R.I. 363, 334 A.2d 208 (1975); Benard v. State, 481 S.W.2d 427 (Tex. Crim. App. 1972).

Did Aleman's actions in the case sub judice rise to the level of fraud or collusion such that he was not subjected to "the risk that is traditionally associated with a criminal prosecution"? The answer must be in the affirmative, considering analogous circumstances. See *Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1986)* (invalidating a judgment of the Alabama Supreme Court because a justice on that court was a party to a similar case pending in an Alabama trial court and, therefore, the judge's pecuniary interest in the outcome of the case required new proceedings); *Breed v. Jones, 421 U.S. 519, 528, 44 L. Ed. 2d 346, 95 S. Ct. 1779 (1975)* (where pecuniary interests of judges have been involved in the cases, the results must be invalidated); *In re Murchison, 349 U.S. 133, 136, 99 L. Ed. 942, 75 S. Ct. 623 (1955)* (recognizing that "[f]airness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome"); *Tumey v. Ohio, 273 U.S. 510, 521-32, 71 L.Ed. 749, 47 S. Ct. 437 (1927)* (holding that defendant was entitled to a new trial where the trial judge received $12 by statute for each case which resulted in a conviction because "officers acting in a judicial * * * capacity are disqualified by their interest in the controversy to be decided * * * ").

The circuit court's supplemental ruling in the present case conclusively determined that there was sufficient evidence to prove the bribery of Judge Wilson and that Aleman had committed the substantive offense of bribery. Aleman contends that he "does not urge a crepuscular constitutional doctrine"; however, his insistence on the finality of acquittals begs this court to adopt an inhibited perception of justice. Given his involvement in the bribery of Judge Wilson in order to procure an acquittal in his 1977 murder trial, we conclude that Aleman clearly was not subject to the risk normally associated with a criminal prosecution. The principles of double jeopardy do not bar the instant reindictment and reprosecution.

By bribing the judge, Aleman prevented a fair "resolution" of the first proceeding. See generally *United States v. Scott, 437 U.S. 82, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978); Simmons v. United States, 142 U.S. 148, 35 L.Ed. 968, 12 S. Ct. 171 (1891); People v. Ortiz, 151 Ill. 2d 1, 600 N.E.2d 1153 175 Ill. Dec. 695 (1992); People v. Forbis, 12 Ill. App. 3d 536, 298 N.E.2d 771 (1973); In re Ascher, 130 Mich. 540. 90 N.W. 418 (1902); State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).*

Aleman would distinguish the foregoing cases upon the proposition that double jeopardy does not operate to prevent a second trial where a lower court discovers a corrupted process upon immediate inquiry. The cases recognize, however, that the substance of the proceeding, rather than the form, is the provenance of justice. The constitution demands fairness not only for the accused but, also, for the accuser. See *Snyder v. Massachusetts, 291 U.S. 97, 122, 78 L.Ed. 674, 54 S. Ct. 330, 338 (1934)* (Cardozo, J., stating that "justice, though due to the accused,

is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true"), overruled on other grounds, *Malloy v. Hogan, 378 U.S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964)*. It is ludicrous to suggest that Aleman has a vested right to a prejudiced factfinder; he will not be allowed to employ here the principles of double jeopardy to shield himself from a second prosecution. See *Simmons v. United States, 142 U.S. 148, 35 L.Ed. 968, 12 S. Ct. 171 (1891)*.

C

Aleman's assertion that the Reitinger indictment is barred under Illinois caselaw proscribing successive federal/state prosecutions, relying upon *People v. Carrillo, 164 Ill. 2d 144, 147, 646 N.E.2d 582, 207 Ill. Dec. 16 (1995)*, and *People v. Porter, 156 Ill. 2d 218, 620 N.E.2d 381, 189 Ill. Dec. 413 (1993)*, also is rejected. "[A] federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, 'subject [defendant] for the same offence to be twice put in jeopardy.' " *United States v. Wheeler, 435 U.S. 313, 317, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978)*; see *United States v. Pungitore, 910 F.2d 1084, 1105 (3rd Cir. 1990); People v. Porter, 156 Ill. 2d 218, 221-22, 620 N.E.2d 381, 189 Ill. Dec. 413 (1993)*.

Aleman was indicted in 1977 on two counts of racketeering, based upon two acts of robbery and one count of interstate transportation of stolen property. *United States v. Aleman, 609 F.2d 298 (7th Cir. 1979)*. Following

conviction, the federal government petitioned the court to sentence Aleman as a "special offender" pursuant to *18 U.S.C. § 3575*, arguing that he participated in Reitinger's murder. The district court denied the government's petition and sentenced Aleman solely upon the charges presented. Therefore, Aleman was neither charged with, nor sentenced upon, Reitinger's murder during his 1977 RICO prosecution.

In 1990, Aleman and several others again were indicted for RICO violations. *18 U.S.C. §§ 1961*-1962(d) (1988). This time he participated in a pattern of racketeering activity based upon 26 acts, one of which was Reitinger's murder. Although he entered a guilty plea, he denied, in part:

> " * * * that he participated in any way in the murder of Anthony Reitinger and further denies that he participated in any bribe of Judge Frank Wilson. The government and his attorney agree that the outcome of a trial or sentencing hearing as to the crimes described in this paragraph is uncertain."

The record reveals, then, that although one of the predicate acts of the 1990 RICO prosecution was the extortion and murder of Reitinger, Aleman's plea agreement specifically denied any involvement in that crime. The United States Attorney advised the district court that the plea agreement "is perhaps a bit unusual in the sense that, as charged in the indictment, Mr. Aleman has been named in participating in two extortions and murder. The plea contemplates an agreement between all the parties in essence that the murder aspect of the indictment will not be resolved." The record uncontrovertably demonstrates

that his plea agreement specifically denied any involvement in the Reitinger murder. Neither *People v. Carrillo, 164 Ill. 2d 144, 646 N.E.2d 582, 207 Ill. Dec. 16 (1995)*, nor *People v. Porter, 156 Ill. 2d 218, 620 N.E.2d 381, 189 Ill. Dec. 413 (1993)*, support his argument, therefore, because the 1990 RICO pleading in the instant case did not involve any factual finding that he participated in the Reitinger murder.

The 1977 and 1990 RICO prosecutions of Aleman do not impede the State's current indictment of him for the murder of Anthony Reitinger.

The foregoing discussion reveals no bases upon which to disturb the circuit court's refusal to dismiss the instant indictments. Accordingly, the court's ruling must be affirmed.

Affirmed.

SCARIANO and BURKE, JJ., concur.

APPENDIX G

IN THE

CIRCUIT COURT OF COOK COUNTY

COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, vs. HARRY ALEMAN, Defendant.	)	Nos. 93 CR 28786 & 93 CR 28787

SUPPLEMENTAL RULING ON DEFENDANT'S MOTION TO DISMISS INDICTMENTS

In its interim ruling of October 12, 1994, this court determined that there was no legal basis to support the contention that Harry Aleman's 1977 acquittal would suffice to raise the bar of double jeopardy. However, to insure that the factual assumptions relied upon in the interim ruling were meritorious, the court concluded that an evidentiary hearing was necessary to establish that the State's allegations of bribery had a basis in fact. Having heard and considered the evidence offered in support of and in opposition to the bribery claim, the court now enters the following factual findings and conclusions of law.

PROCEDURAL CONSIDERATIONS – ALLOCATION OF BURDEN OF PROOF

At the commencement of the evidentiary hearing counsel for the respective parties commented upon the

nature of this proceeding and the requisite burden of proof. In response, the court observed that inasmuch as the motion to dismiss was brought pursuant to Section 114-1(a)(2), of the Code of Criminal Procedure, 725 ILCS 5/114-1(a)(2) (West 1992), the movant had the burden of establishing his entitlement to relief by a preponderance of the evidence. Support for this proposition is found in 21 Am.Jur.2d, "Criminal Law", Sec.466, p.747:

> "On a plea of former conviction, acquittal, or jeopardy, there is no presumption in favor of the accused. Since such plea sets up affirmative matter and is not a denial of any allegations of the indictment or information, the burden from the start is on the accused to sustain his plea by a – preponderance of the evidence. He must prove not only the former jeopardy, conviction, or acquittal, but also the identity of the offenses and the jurisdiction of the court on the former trial."

Where the plea of former jeopardy raises an issue of fact either the court or the jury, depending upon the jurisdiction, must determine such question. Among the questions of fact presented by a plea of double jeopardy is whether the former trial was collusive. 21 Am.Jur.2d, "Criminal Law", Sec.467, p.749. See e.g. *State v. Caldwell*, 70 Ark. 74, 78, 66 S.W. 150 (1902).

– In adherence to these principles the court further stated that defendant had made a prima facie case for dismissal based upon the exhibits filed; i.e. Harry Aleman's 1977 indictment, together with the common law record entry evidencing his acquittal for the murder of William Logan. Recognizing the State's position to be that Aleman's former trial was a sham proceeding, the court

announced that the burden had shifted to the People to establish their bribery claim and that the State would be held to the same burden as the defendant, proof by a preponderance of the evidence. Although the court is mindful of the People's offer that they be held to the higher burden of proof beyond a reasonable doubt, the court's allocation of burdens finds support in *United States v. Thornton*, 972 F.2d 764 (7th Cir 1992), where the defendant claimed that an earlier indictment charged the same conspiracy as the one under consideration. In allocating burdens the court determined on page 767:

> " . . . that the defendant bears the burden of making a prima facie showing that the two indictments cover the same offense, and thereafter the burden shifts to the government to demonstrate that it has not twice prosecuted the defendant for the same conspiracy."

DISCUSSION

The State's bribery claim is essentially bottomed upon the testimony of Robert Cooley, a criminal defense practitioner who, because of the revelations disclosed here and elsewhere, has been disbarred. Mr. Cooley testified that through his association in the firm of Kugler, DeLeo and D'Arco, he became acquainted with Pat Marcy, secretary for the 1st Ward Democratic Organization. In February, 1977, John D'Arco, Sr., summoned Cooley to Counselor's Row on LaSalle Street to meet with himself and Marcy. On that occasion Marcy asked Cooley if he had a judge at 26th Street who could fix Harry Aleman's murder case. In response, Cooley told Marcy that he had somebody in mind, but would have to make

further inquiries. After reading the police reports Cooley met with Judge Frank Wilson, whom he described as a close friend, telling him that he had been approached on a serious murder case. Apparently sensing that Cooley was talking about the Aleman case, Wilson told him that he already had been named in a petition for substitution of judges. The conversation that ensued led Cooley to conclude that if the case could be returned to Judge Wilson he felt he could reach out to him.

The following day Cooley reported his conversation with Frank Wilson to Marcy, telling him that he believed he had a judge who might be interested, but that the case already had been assigned elsewhere. Marcy, in turn, instructed Cooley to offer Judge Wilson $10,000.00, and if he agreed to fix the case Marcy would see to it that the matter would go to him. That same evening Cooley again met with Frank Wilson at Greco's Restaurant on the south side and communicated the offer to him. He also cautioned Wilson to think carefully about it because the people on his side were very nasty.

Within a day or so Cooley had another meeting with Judge Wilson, at which time Wilson agreed to handle the case subject to two conditions; first, that because of their close relationship Cooley could not appear as Aleman's attorney, and second, Aleman's present attorney, Thomas J. Maloney, would have to withdraw from the case. Cooley concurred in these conditions and tendered $2,500.00 of his own money to the judge with the understanding that the balance would be paid after Aleman was acquitted.

The following day Cooley met with Marcy and John D'Arco, Jr., informing them that Judge Wilson had agreed to fix the case subject to the conditions noted and had accepted a partial payment from him. On this occasion Marcy stated that the substitution of judge petition naming Wilson would be withdrawn, but that Maloney had to try the case.

Shortly thereafter, Marco D'Amico summoned Cooley to the King's Inn on Mannheim Road, at which time Cooley, in D'Amico's presence, assured Harry Aleman that the matter had been taken care of and that Judge Wilson would "throw the case out." Although Aleman wanted Tom Maloney to remain as his attorney it developed that Judge Wilson was adamant in his demand that Maloney withdraw. Wilson told Cooley that it would look suspicious for the attorney who had sought his removal from the case to later withdraw the petition and successfully defend the charges before the same judge he had earlier claimed to be prejudiced. Eventually, Wilson had his way and Marcy selected Frank Whalen to substitute as counsel. Upon being so apprised Judge Wilson concurred in the choice, but cautioned Cooley not to bring him around.

In a second meeting with Harry Aleman at the King's Inn, Cooley assured defendant that Judge Wilson had no problem with the selection of Whalen, and that he would throw out the case. Thereafter, Cooley met with Frank Whalen at a room in the Bismarck Hotel and made identical assurances to him that the case was fixed. The two exchanged telephone numbers and Cooley later met with Whalen in Florida to discuss trial strategy as well as Aleman's claim of a possible witness who could be bribed

for $10,000.00 to say that Aleman was not William Logan's killer.

On May 16, 1977, Harry Aleman waived his right to a jury and trial commenced before Judge Wilson. (People's Exhibit #1j). Cooley recalled that on the second day of trial the judge requested that they meet at the Somerset, a south side bar, and on that occasion complained that the case was not as weak as Cooley had represented, and that Whalen was not doing a good job. In a follow-up meeting Wilson requested more money, claiming he would be taking a lot of heat for finding Aleman not guilty and would probably lose his judgeship. When Marcy was informed of this he rejected the request out-of-hand, telling Cooley that Wilson would not get "a nickel more."

On May 24, 1977, Harry Aleman was found not guilty of William Logan's murder. (People's Exhibit #1b). The same evening Cooley met Pat Marcy at Counselor's Row and was given two envelopes, one for Judge Wilson containing $7,500.00, and the other for himself containing $3,000.00, an amount far below what Cooley had anticipated. Later that evening he met Wilson at the Somerset, accompanied by his secretary, Cathy Fleming whom he also then was dating. After withdrawing from her presence to the men's room, Cooley testified that he gave Wilson the $7,500.00 due him.

Sometime after the trial Cooley recalled another meeting with Harry Aleman at Mama Sue's Restaurant on Taylor Street. On that occasion Aleman, in the presence of Butch Petrocelli, expressed his pleasure for the good job Cooley had done. He also took some of Cooley's business cards stating that how would refer some cases to him.

In corroboration of Cooley's testimony the State presented Vince Rizza, a former associate and erstwhile confidant of Aleman. Rizza, a former policeman, recounted a host of illegal occupations and activities he engaged in between 1974 and 1982, including bookmaking, drug dealing, extortion and selling stolen securities. In 1982, he was convicted of conspiracy to distribute narcotics and received a sentence of 15 years. That sentence later was reduced to 7 years for his cooperation with the government, Rizza having become a member of the Federal Witness Protection Program.

Rizza testified that he met Harry Aleman in the spring of 1975, at which time Aleman demanded that he pay "back street taxes" of $40,000.00, and thereafter remit $1,000.00 monthly for the privilege of running his own bookmaking operation. Through the good offices of Angelo Pietra the arrearage was negotiated downward, with the understanding that Aleman and his associate Jimmy Inendino would become partners with Rizza. Under the terms of that understanding Aleman and Inendino would share in Rizza's take, with Rizza, in turn, being assured of protection from Aleman and the right to continue his bookmaking operation. Later, he assisted Aleman in organizing other independent bookmakers, as was done in the 1930's and 1940's, bringing them within the sphere of Aleman's orbit of protection. Rizza's testimony concerning his business relationship with Harry Aleman was corroborated by the admissions made by the defendant on the occasion of his guilty plea to federal charges before Judge Ann Williams on October 23, 1991. (Stipulation #2).

Regarding the William Logan murder, Rizza related that in the winter of 1977 he met Aleman at the Vernon Tap on Taylor Street. In a brief conversation Aleman told him that the case had been "taken care of" and that committing murder in Chicago was O.K. if you "killed the right people." At a subsequent meeting on Taylor Street, Aleman told Rizza that he was taking a bench trial and would not be going to jail, that jail simply was "not an option." Finally, at a third meeting in April or May, 1977, Rizza remarked to Aleman that things looked bad as the papers were crucifying him. Aleman replied that it was not a problem, the case was taken care of.

The State also offered by stipulation the testimony of Catherine Fleming, taken from the trial of Fred Roti before Judge Marvin Aspen in the district court on January 4, 1993. In that proceeding Ms. Fleming testified that commencing in April or May, 1977, she was employed as Bob Cooley's secretary. She related that after work at the time of Aleman's murder trial she accompanied Cooley to a south side bar. Cooley had gone there to meet with someone whom she subsequently learned to be Judge Wilson. According to Ms. Fleming, the judge appeared to be sad and thereafter he and Cooley left her at the bar. When Wilson returned, outside of Cooley's presence he told her, "You look like a nice young girl, stay away from him." Later, Ms. Fleming saw a picture of Judge Wilson on the news, or in the paper, relating to the trial of Harry Aleman and she recognized him as the same person she previously had met. (People's Exhibit #3).

As further corroboration of Cooley's bribery evidence the State also by stipulation presented the testimony of Monte Katz taken on July 19, 1994 in the United

States District Court during the trial of Thomas J. Maloney. In that proceeding Mr. Katz testified as to conversations had with Harry Aleman at the Federal Correctional Facility at Oxford, Wisconsin in 1993 and 1994. By way of background, Katz recounted his involvement in criminal activities commencing in 1965, when at age 18, he was convicted of armed robbery and forgery, and concluding at age 45, with a conviction for distribution of heroin. Rounding out the years in between were convictions for interstate theft, unlawful use of weapons, forgery and possession of cocaine. Katz became a cooperating individual with the federal government in March, 1994, and as a consequence thereof testified at Thomas Maloney's sentencing hearing concerning the bribing of Judge Wilson. That testimony, as might be expected, was provided by Katz in hopes of receiving a sentence reduction on his current case.

Katz related that he became friends with Harry Aleman while the two were incarcerated at the Metropolitan Correctional Center in Chicago. That friendship continued when they were transferred to Oxford. From January, 1993, and continuing over some 17 months, Aleman bragged about how he had committed crimes ranging from burglary to murder. In October, 1993, Aleman told Katz and others that he learned he was to be re-indicted for the murder of Billy Logan. Aleman stated that the news was no cause of any concern to him. Later, in March, 1994, Aleman related that he had escaped prosecution by having the case fixed. He told Katz that his attorney, Tom Maloney, had been able to secure a favorable judge in the case and then reached out to Pat Marcy who was able to get to the judge. Maloney then dropped

out of the case and his uncle, Joe Feriolla, paid Marcy the money required to reach the judge.

Additional evidence was received by stipulation of the parties. People's Exhibit #1 contains copies of the court file in the case of the *People of the State of Illinois v. Harry Aleman*, 76 C 6958. Included therein is the Petition for Substitution of Judges filed on December 30, 1976, naming James A. Bailey and Frank J. Wilson as judges who were prejudiced against him. (People's Exhibit #1c). That petition was granted on January 3, 1977, and the cause thereafter was re-assigned to Judge Fred G. Suria. On March 8, 1977, defendant moved to strike Judge Suria for cause (People's Exhibit #1f), and on that same date Judge Suria recused himself. Aleman subsequently withdrew Judge Wilson's name from the original petition and the case was assigned to his call where it remained until judgment was entered. On April 4, 1977, Thomas Maloney withdrew as Aleman's counsel and Attorney Frank Whalen was given leave to appear as substitute counsel. (People's Exhibit #1g) Edward J. Whalen filed his appearance as additional counsel on May 6, 1977. (People's Exhibit #1h). A jury waiver was filed by Aleman on May 16, 1977, and the matter then proceeded to trial before Judge Wilson. (People's Exhibit #1j).

The parties also stipulated as to certain evidence pertaining to the investigation in the aftermath of Cooley's revelations. Under the auspices of the F.B.I., Cooley arranged to meet Judge Wilson in Scottsdale, Arizona. Although Cooley was wearing a recording device when he discussed the $10,000.00 bribe payment with Wilson, neither the tape nor a transcript of that recording

was introduced in this proceeding. However, on November 30, 1989, representatives of the F.B.I. and Chicago Police Department interviewed Judge Wilson at his Sun City residence and, in the course of that conversation, informed him of the pending investigation and Bob Cooley's allegations that he had paid the judge $10,000.00 to fix the case. Judge Wilson denied receiving any money on the case, but declined the invitation to listen to the recording of his earlier meeting with Cooley. The agents then served Wilson with a grand jury subpoena calling for his appearance in Chicago on December 6, 1989. (Stipulation #6).

Frank Wilson did not appear as directed. On February 5, 1990, his body was discovered in his own backyard with a gunshot wound to the head, inflicted by the gun held in his hand. (Stipulation #7). A brief note to his wife confirming the suicide contained a recital of significant health problems. (Defendant's Exhibit #4).

Defendant offered no testimony in this proceeding, but did submit an affidavit denying his participation in the bribing of any judge in the William Logan murder case. He also denied meeting with Robert Cooley at any hotel or motel in 1977, or ever speaking with him concerning the Logan matter.

Defendant did however, present the testimony of Edward J. Whalen, one of his former attorneys. Mr. Whalen testified that he assisted Frank Whalen in preparing the case for trial, and that his uncle never gave any indication that the case was fixed, nor was there anything to indicate to him that such was the case. Although Mr. Whalen corroborated Cooley's statement that Frank

Whalen was residing in Florida prior to the Aleman trial, he testified that his uncle resided in a John Hancock Center condominium during the pendency of the trial. Mr. Whalen had no knowledge of his uncle maintaining a residence in the Bismarck Hotel while he was in Chicago.

Defendant also introduced an F.B.I. report completed by Special Agent John Bowen on March 1, 1989, detailing the results of his interview that same day with Robert Cooley. The report reflects two inconsistencies between Cooley's testimony in this proceeding and what Agent Bowen recorded. As earlier noted, Cooley testified that it was Judge Wilson who suggested and later demanded that Thomas Maloney withdraw from the case. However, the report reflects that Cooley asked Marcy to remove him simply because of his dislike for Maloney. In addition, Cooley testified that he had advanced the $2,500.00 initially paid to Wilson. The agent's report however indicates that Cooley told the agent that he had been given a $2,500.00 advance by Marcy to be given Wilson to "Lock him in on the case." (Defendant's Exhibit #3).

At the commencement of the evidentiary hearing defendant objected to the majority of Robert Cooley's testimony on grounds of hearsay. Understandably, the State's position was that all of the conversations that Cooley had with Pat Marcy and Frank Wilson were admissible under the coconspirator's exception. The court earlier stated that based upon the People's offer of proof the State's position appeared to have merit, and that the conversations would be received, subject to the proviso that if the State failed to meet the threshold requirements for admissibility the court would strike that testimony and disregard it.

The coconspirator's exception to the hearsay rule provides that the acts and declarations of a coconspirator made in furtherance of the conspiracy are admissible against a defendant even when made outside his presence. *People v. Columbo*, 118 Ill.App.3d 882, 945, 455 N.E.2d 733 (1st Dist. 1983). To avail itself of the coconspirator exception the State need not charge the crime of conspiracy, but rather need only establish a prima facie case through independent evidence that two or more persons were engaged in a common plan to accomplish a criminal goal. *People v. Edwards*, 128 Ill.App.3d 993, 1003-04, 471 N.E.2d 957 (2nd Dist. 1984). The existence of the agreement, which is the essence of a conspiracy, need not be proved by direct evidence, but may be inferred from all of the surrounding facts and circumstances, including the acts and declaration of the defendant. *People v. Katsigiannis*, 171 Ill.App.3d 1090, 1099, 526 N.E.2d 508 (2nd Dist. 1988); *People v. Olmos*, 77 Ill.App.3d 287, 291, 395 N.E.2d 968 (1st Dist. 1979).

From a review of the evidence presented here, there appears to be more than an adequate basis to determine that a conspiracy existed between the principal actors, independent of the hearsay statements attributed to Pat Marcy and Frank Wilson. As previously noted, Cooley discussed the bribery plan with Harry Aleman on several occasions. The existence of the agreement may also be inferred circumstantially from the contemporaneous events borne out from the common law record such as the striking of Judge Wilson's name from the substitution of judges petition and the assignment of the case to him, Thomas Maloney's withdrawal as counsel, the substitution of Frank Whalen and Aleman's eventual jury waiver.

The court therefore concludes that Cooley's conversations with Marcy and Wilson were properly admitted under the coconspirator's exception.

In determining whether the People have met their burden of establishing the bribery of Judge Wilson, the court recognizes that the State's claim rests essentially upon the credibility of Robert Cooley. Cooley's status as a lawyer-turned-government-informer was also the focus of discussion in *United States v. Shields*, 999 F.2d 1090 (7th Cir. 1993), where the Seventh Circuit, in assessing his believability, observed on page 1093:

> ". . . . In his trial testimony, Cooley claimed to have bribed in his robust career at least twenty-nine Cook County judges as well as prosecutors, court clerks, police officers, corporation counsels, state's attorneys, a police chief and a mayor before deciding on his own initiative – no investigation against him was pending at the time – to assist the F.B.I. as an informer in ensnaring corrupt Chicago officials."

Having so observed, the court nonetheless concluded that Cooley's testimony was believable, albeit that the government's case lacked the "kind of unassailable clarity one might wish to see in a prosecution of this sort." *Shields*, 999 F.2d at 1093.

This court likewise finds Robert Cooley to be a credible witness. While his sordid tale of corruption is disheartening, it is nonetheless supported by the corroborating testimony of Vince Rizza and Monte Katz, both of whom recounted Aleman's damaging admissions. And although the court is well apprised of the baggage each carried by reason of their prior criminal activities,

one would hardly expect that the confidants of a person involved in the enterprises attributed to Harry Aleman would be pillars of the community. And while Mr. Rizza's use of cocaine during the years in question calls for close scrutiny of his testimony, this is not a situation where the State's case rests solely upon the testimony of an admitted addict. See e.g., *People v. Galloway*, 59 Ill.2d 158, 163, 319 N.E.2d 498 [1974); *People v. Luckett*, 48 Ill.App.3d 536, 546, 362 N.E.2d 1297 (1st Dist. 1977).

Cooley's version of what transpired is also corroborated by the statements of Catherine Fleming placing Cooley and Wilson together at the very time Cooley claimed to have delivered his final payment. Additionally, as the State submits, the common law record itself lends further support to Robert Cooley's story. From that record one discerns the rather curious spectacle of the defendant, who first struck Frank Wilson as a judge who was prejudiced against him and then, within the passage of ten weeks, withdrew his objection and allowed the case to be assigned to that same judge. Likewise significant is the fact that while Aleman had been released on bond on the most serious of charges prosecuted in this land, the case proceeded to trial in less than five months from the date of his arraignment. Of similar concern is the fact that Attorney Frank Whalen set the case for trial within six weeks of filing his appearance and requested no interim continuance to insure the adequate preparation one might reasonably anticipate in a case of this magnitude.

Based upon the evidence presented, the court finds that the State has met its burden in establishing that a bribery indeed occurred. Although the court earlier

observed that the State's burden was to establish the bribery by a preponderance of the evidence, the court concurs in the State's appraisal that the evidence presented also meets the standard of proof beyond a reasonable doubt. Were this a prosecution for the substantive offense of bribery, 720 ILCS 5/33-1 (West 1992), the court would have little difficulty in concluding that the People had presented a credible and coherent case against the defendant. The evidence clearly establishes the tendering of money to a public officer to influence him in the performance of his official duties. *People v. Clemons*, 26 Ill.2d 481, 483, 187 N.E.2d 260 (1962); *People v. Powell*, 48 Ill.App.3d 723, 727, 362 N.E.2d 1329 (1st Dist. 1977); *United States v. Isaacs*, 493 F.2d 1124, 1145 (7th Cir. 1974).

CONCLUSION

In summary, on October 12, 1994, this court determined that as to the claims of double jeopardy, judicial estoppel and denial of speedy prosecution no legal basis existed to grant the relief sought by defendant. As a result of the evidentiary hearing the court now concludes that the factual basis underlying the People's bribery claim has been established by the requisite quantum of proof. Accordingly, the motion to dismiss each of the subject indictments shall be and is hereby denied.

ENTERED: _____

Michael P. Toomin
Judge of the Circuit Court
Criminal Division

DATED: March 9, 1995

APPENDIX H

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Illinois Dispositions of Petitions for Leave to Appeal".)

Supreme Court of Illinois
People
v.
Harry Aleman
NO. 89744
SEPTEMBER TERM, 2000
October 04, 2000

Lower Court: 313 Ill.App.3d 52, 246 Ill.Dec. 20, 729 N.E.2d 20

Disposition: Denied.

Ill. 2000.

People v. Aleman